

FINRA proposed to adopt the short interest reporting requirements in NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 as FINRA Rule 4560 in the Consolidated FINRA Rulebook.

NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 set forth FINRA's short interest reporting requirements.<sup>5</sup> NASD Rule 3360 requires members to report short positions<sup>6</sup> in OTC Equity Securities<sup>7</sup> and exchange-listed securities not otherwise reported to another self-regulatory organization ("SRO"),<sup>8</sup> and Incorporated NYSE Rules 421(1) and 421.10 require members to report short positions in NYSE-listed securities. Members must report total short positions in all customer and proprietary accounts as of the designated settlement dates and in the manner so prescribed.<sup>9</sup> Currently, the rules require such information to be reported twice a month, which in turn, is then made publicly available on an aggregate basis twice a month.<sup>10</sup>

As of June 30, 2008, FINRA consolidated the collection of short interest data, so that firms report short interest positions in all securities to FINRA using the Regulation Filing Applications system; consequently, firms will no longer be able to report any of their short interest positions using the NYSE's Electronic Filing Platform ("EFP") or the Securities Industry Automation Corporation ("SIAC").<sup>11</sup>

Given that the short interest requirements in each of the rules are substantially similar, FINRA proposed to adopt these requirements as part of

<sup>5</sup> Incorporated NYSE Rules 421(2) and 421.40 require members carrying margin accounts for customers to report certain aggregate debit and free credit balances.

<sup>6</sup> Short positions required to be reported under the rules are those resulting from "short sales" as the term is defined in Rule 200(a) of Regulation SHO, subject to certain limited exceptions. See NASD Rule 3360(b)(1).

<sup>7</sup> The term "OTC Equity Securities" refers to any equity security that is not listed on a national securities exchange. See NASD Rule 3360(b)(3).

<sup>8</sup> It is the responsibility of each member firm to ensure that it is reporting accurate short interest data, including confirming that issue symbols are active and valid as of the designated settlement date. See *Notice to Members* 06-20 (April 2006).

<sup>9</sup> Non-self-clearing broker-dealers generally are considered to have satisfied their reporting requirement by making appropriate arrangements with their respective clearing organizations. See *Notice to Members* 03-08 (February 2003).

<sup>10</sup> A schedule of FINRA's designated settlement dates can be found on its Web site at <http://www.finra.org>. See also *Notice to Members* 07-24 (May 2007).

<sup>11</sup> See *Regulatory Notice* 08-13 (March 2008). Prior to June 30, firms reported short interest positions in NYSE-listed securities through the EFP and all other securities through FINRA's Regulation Filing Applications ("RFA") system or the SIAC.

the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. Most notably, because FINRA will now be the primary collector of consolidated short interest data for its members in all securities (rather than only if such positions in exchange-listed securities are not reported to another SRO), FINRA is not retaining the text in NASD Rule 3360 that limits short interest reportable to FINRA to those positions in exchange-listed securities "not otherwise reported to another self-regulatory organization."

### III. Discussion and 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 that are applicable to a national securities association.<sup>12</sup> In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>13</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission notes that it has previously approved the short interest reporting requirements of NASD Rule 3360<sup>14</sup> and NYSE Rules 421(1) and 421.10<sup>15</sup>, and the proposed rule change moves these requirements to the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. The short interest reporting requirements previously have been found to meet the statutory requirements, and the Commission believes such requirements have since proven effective in achieving the statutory mandates.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-FINRA-2008-033), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

<sup>12</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78(c)(f).

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> Securities Exchange Act Release No. 56279 (Aug. 17, 2007), 72 FR 48713 (Aug. 24, 2007).

<sup>15</sup> Securities Exchange Act Release No. 57252 (Feb. 1, 2008), 73 FR 7343 (Feb. 7, 2008).

<sup>16</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58457; File No. SR-NYSEArca-2008-91]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding the Listing of Fourteen Funds of the Commodities and Currency Trust

September 3, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on August 21, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve 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, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), proposes to list and trade shares ("Shares") of fourteen (14) funds ("Funds") of the Commodities and Currency Trust ("Trust") based on several currencies, commodities and commodities indexes.

#### 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 self-regulatory organization 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. The Exchange has prepared summaries, set forth in sections A, B, and C below,

<sup>17</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.

of the most significant parts 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 list and trade Shares of the Funds pursuant to NYSE Arca Equities Rule 8.200, Commentary .02, which permits the trading of Trust Issued Receipts ("TIRs") either by listing or pursuant to unlisted trading privileges ("UTP"). The Shares have been approved by the Commission for listing on the American Stock Exchange LLC ("Amex")<sup>3</sup> and for trading on the Exchange pursuant to UTP.<sup>4</sup> The issuer of the Shares has determined to list the Shares on the Exchange. The Exchange represents that the Shares satisfy the requirements of NYSE Arca Equities Rule 8.200 and thereby qualify for listing on the Exchange.

Shares of each Fund will be generally subject to the rules that apply to TIRs. The Shares represent common units of fractional undivided beneficial interest in, and ownership of, each Fund. Each Fund will invest the proceeds of its offering of Shares in various Financial Instruments<sup>5</sup> that will provide exposure to the Fund's underlying currency, commodity or commodity index. 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 (7) of the Funds of the Trust will be designated as Ultra ProShares while the other seven (7) Funds of the Trust will be designated as UltraShort ProShares. Each of the Funds will have a distinct investment objective.<sup>6</sup> The Funds will attempt, on

<sup>3</sup> See Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 [sic] (July 21, 2008) (SR-Amex-2008-39). Notice of the Amex proposed rule change was published in Securities Exchange Act Release No. 57932 (June 5, 2008), 73 FR 33467 (June 12, 2008) ("Amex Proposal").

<sup>4</sup> See Securities Exchange Act Release No. 58162 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR-NYSEArca-2008-73).

<sup>5</sup> Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200 defines "Financial Instruments" as any combination of cash, securities, options on securities and indices, futures contracts, options on futures contracts, forward contracts, equity caps, collars and floors and swap agreements.

<sup>6</sup> The Funds are the Ultra DJ-AIG Commodity ProShares, UltraShort DJ-AIG Commodity ProShares, Ultra DJ-AIG Agriculture ProShares, UltraShort DJ-AIG Agriculture ProShares, Ultra DJ-AIG Crude Oil ProShares, UltraShort DJ-AIG Crude Oil ProShares, Ultra Gold ProShares, UltraShort Gold ProShares, Ultra Silver ProShares, UltraShort Silver ProShares, Ultra Euro ProShares, UltraShort

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 (6) Funds will be based on the following benchmark commodities indexes: (i) The Dow Jones-AIG Commodity Index<sup>SM</sup>; (ii) the Dow Jones-AIG Crude Oil Sub-Index<sup>SM</sup>; and (iii) the Dow Jones-AIG Agriculture Sub-Index<sup>SM</sup> (each, an "Underlying Index" and collectively, the "Underlying Indexes"). Four (4) Funds will be based on the following commodities: (i) Gold; and (ii) silver (each, an "Underlying Commodity" and collectively, the "Underlying Commodities"). Four (4) Funds will be based on the following 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 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 a Fund is successful in meeting its investment objective, the net asset value ("NAV")<sup>7</sup> of the Shares of each Fund is expected to gain on a percentage basis, approximately twice as much as each 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 Fund is successful in meeting its objective, the NAV of the Shares of each Fund is expected to increase approximately twice as much, on a

Euro ProShares, Ultra Yen ProShares and UltraShort Yen ProShares.

<sup>7</sup> "Net asset value" 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, net asset value 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.

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. The Exchange notes that the Commission has permitted the listing and trading on the Exchange and other national securities exchanges of securities linked to the performance of underlying currencies and commodities.<sup>8</sup> The

<sup>8</sup> The Commission has previously approved issues of Commodity-Based Trust Shares, Currency Trust Shares and Commodity Index Trust Shares, which have certain characteristics similar to the proposed TIRs, for exchange listing and trading. See, e.g., Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR-NYSE-2004-22) (order approving listing on the New York Stock Exchange ("NYSE") of streetTRACKS Gold Trust); Securities Exchange Act Release No. 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (SR-Amex-2004-38) (order approving listing on the American Stock Exchange ("Amex") of the iShares COMEX Gold Trust); Securities Exchange Act Release No. 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR-Amex-2005-72) (order approving listing on Amex of the iShares Silver Trust); Securities Exchange Act Release No. 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR-NYSEArca-2007-43) (order granting accelerated approval to list on NYSE Arca the iShares COMEX Gold Trust); Securities Exchange Act Release No. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR-NYSE 2005-65) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Euro Trust); Securities Exchange Act Release No. 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR-NYSE-2006-35) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Australian Dollar Trust, CurrencyShares British Pound Sterling Trust, CurrencyShares Canadian Dollar Trust, CurrencyShares Mexican Peso Trust, CurrencyShares Swedish Krona Trust and CurrencyShares Swiss Franc Trust); Securities Exchange Act Release No. 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR-NYSE-2007-03) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Japanese Yen Trust); Securities Exchange Act Release No. 56131 (July 25, 2007), 72 FR 42212 (August 1, 2007) (SR-NYSEArca-2007-57) (order granting accelerated approval for listing on NYSE Arca of CurrencyShares Trusts); Securities Exchange Act Release No. 54013 (June 16, 2006), 71 FR 36372 (June 26, 2006) (SR-NYSE-2006-17) (approving listing on the NYSE of the iShares GSCI Trust); Securities Exchange Act Release No. 55585 (April 5, 2007), 72 FR 18500 (April 12, 2007) (SR-NYSE-2006-75) (approving for NYSE listing the iShares GS Commodity Light Energy Indexed Trust; iShares GS Commodity Industrial Metals Indexed Trust; iShares GS Commodity Livestock Indexed Trust and iShares GS Commodity Non-Energy Indexed Trust); Securities Exchange Act Release No. 56932 (December 7, 2007), 72 FR 71178 (December 14, 2007) (SR-NYSEArca-2007-112) (order granting accelerated approval to list iShares S&P GSCI Commodity-Indexed Trust); Securities Exchange Act Release No. 57456 (March 7, 2008), 73 FR 13599 (March 13, 2008) (SR-NYSEArca-2007-91) (order granting accelerated approval for NYSE Arca listing the iShares S&P GSCI Energy Commodity-Indexed Trust; iShares S&P GSCI Natural Gas Commodity-Indexed Trust; iShares S&P GSCI Industrial Metals Commodity-Indexed Trust; iShares S&P GSCI Light Energy Commodity-Indexed

Commission also has approved for trading on the Exchange on a UTP basis under NYSE Arca Equities Rule 5.2(j)(3) UltraFunds, Short Funds and UltraShort Funds of the ProShares Trust.<sup>9</sup>

A description of each of the Underlying Indexes, commodities Underlying Benchmarks and currency Underlying Benchmarks is set forth in the Amex Proposal.<sup>10</sup> In addition, information regarding the structure and investment objective of the Funds, the portfolio investment methodology, investment techniques, and creation and redemption of Shares is provided in the respective Registration Statements and in the Amex Proposal.

*Net Asset Value (NAV).* The NAV of a Fund is total assets including, but not limited to, all cash and cash equivalents or other debt securities, less total liabilities, each determined on the basis of generally accepted accounting principles. In particular, the NAV includes any unrealized profit or loss on open Financial Instruments and any other credit or debit accruing to a Fund, but unpaid or not received.

The NAV per Share of each Fund is computed by dividing the value of the net assets of such Fund (*i.e.*, the value of its total assets, less total liabilities) by its total number of Shares outstanding. Expenses and fees are accrued daily and taken into account for purposes of determining NAV. The NAV of each Fund is calculated by the Administrator and is determined each business day as described further in the Amex Proposal.

The Exchange represents that it will obtain a representation (prior to listing the Shares of the Funds) from the Trust that the NAV per Share will be calculated daily and made available to all market participants at the same time.

#### *Availability of Information Regarding the Shares*

The Web sites for the Funds and/or the Exchange, which are publicly accessible at no charge, will contain the following information: (a) The current NAV per Share daily and the prior business day's NAV per Share and the reported closing price; (b) the mid-point of the bid-ask price in relation to the NAV per Share as of the time it is calculated (the "Bid-Asked Price"); (c) calculation of the premium or discount

of such price against the NAV per Share; (d) 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 (4) previous calendar quarters; (e) the Prospectus; and (f) other applicable quantitative information.

The NAV per Share will be calculated and disseminated daily. The Exchange will disseminate for the Funds on a daily basis by means of CTA/CQ High Speed Lines information with respect to the corresponding "Indicative Value" (as discussed below), recent NAV per Share and Shares outstanding. The Exchange will also make available on its Web site (<http://www.nyse.com>) daily trading volume of the Shares, closing prices of the Shares, and the NAV per Share. The closing price and settlement prices of the futures contracts held by the Funds are also readily available from the Chicago Mercantile Exchange ("CME"), New York Mercantile Exchange ("NYMEX"), Chicago Board of Trade ("CBOT"), Intercontinental Exchange/New York Board of Trade ("ICE/NYBOT"), London Metal Exchange ("LME"), automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. 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.

#### *Portfolio Disclosure*

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, cash equivalents and amount of cash held in the portfolio of each Fund. This public 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, at

<http://www.proshares.com>, and/or at the Exchange's Web site.

#### *Availability of Information About the Underlying Benchmarks*

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, *e.g.*, <http://www.ino.com> and <http://www.finance.yahoo.com>. Data regarding each Underlying Index is also available from the respective index provider to subscribers. In addition, data is 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).

Data regarding spot pricing of the Underlying 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 London Bullion Market Association ("LBMA") Web site at <http://www.lbma.org.uk>.

Data regarding futures contracts and options on futures contracts in connection with the Underlying Commodities is also available from the NYMEX at <http://nymex.com>. There is considerable public price and data information regarding the Underlying Currencies (euro and Japanese yen). Spot pricing related to foreign 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.

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>. 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

Trust; iShares S&P GSCI Livestock Commodity-Indexed Trust; and iShares S&P GSCI Non-Energy Commodity-Indexed Trust).

<sup>9</sup> See Securities Exchange Act Release No. 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR-NYSEArca-2006-87); Securities Exchange Act Release No. 57017 (December 20, 2007), 72 FR 73955 (December 28, 2007) (SR-NYSEArca-2007-108).

<sup>10</sup> See note 3, *supra*.

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).

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 at <http://www.lbma.org.uk>. Data regarding futures contracts and options on futures contracts in connection with the Underlying Benchmark commodities is also available from NYMEX at <http://www.nymex.com>.

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.

#### *Dissemination of Net Asset Value and Indicative Value*

The Administrator calculates and disseminates, once each trading day, the NAV per Share to market participants. The Exchange will obtain a representation (prior to listing of the Funds) from the Trust that the NAV per Share will be calculated daily and made available to all market participants at the same time. In addition, the Administrator causes to be made available on a daily basis the corresponding Cash Deposit Amounts to be deposited in connection with the issuance of the respective Shares.

In order to provide updated information relating to the Fund for use by investors, professionals and persons wishing to create or redeem the Shares, the Exchange will disseminate an updated Indicative Value. The Indicative Value will be disseminated on a per-Share basis at least every 15 seconds during Exchange Core Trading Session trading hours of 9:30 a.m. to 4 p.m. ET. The Indicative 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 NYSE Arca Equity Rule 8.200(d) and Commentary .02(d) to Rule 8.200 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 ninetieth (90) day following such date, unless (i) the subscription minimum is reached before that date and the Managing Owner determines to end the initial offering period early or (ii) that date is extended by the Managing Owner for up to an additional 90 days.

The anticipated minimum number of Shares for each Fund to be outstanding at the start of trading will be 50,000 Shares. The Exchange believes that this anticipated minimum number of Shares for each Fund to be outstanding at the start of trading is sufficient to provide adequate market liquidity and to further the objectives of the Funds. The Exchange represents that, for the initial and continued listing of the Shares, the Shares must be in compliance with NYSE Arca Equities Rule 5.3 and Rule 10A-3 under the Exchange Act.

#### *Trading Rules*

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Trading in the Shares on the Exchange will occur in accordance with NYSE Arca Equities Rule 7.34(a). The Exchange has appropriate rules to facilitate transactions in the Shares during this time. The minimum trading increment for Shares on the Exchange will be \$0.01.

Further, NYSE Arca Equities Rules 8.200, Commentary .02 sets forth certain restrictions on equity trading permit holders ("ETP Holders") acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. Rule 8.200, Commentary .02(e)(3) requires that the ETP Holder acting as a registered Market Maker in the Shares provide the Exchange with information relating to its trading in the applicable physical asset or commodity, related futures or options on futures, or any other related derivatives as may be requested. NYSE Arca Equities Rule 8.200, Commentary .02(e)(4) prohibits the ETP Holder acting as a registered Market Maker in the Shares from using

any material nonpublic information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the applicable underlying physical asset or commodity, related futures or options on futures, or any other related derivative (including the TIRs). In addition, NYSE Arca Equities Rule 8.200, Commentary .02(e)(1) prohibits the ETP Holder acting as a registered Market Maker in the Shares from being affiliated with a market maker in the applicable physical asset or commodity, related futures or any other related derivatives unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and any person or entity controlling an ETP Holder. The Exchange also has regulatory jurisdiction over a subsidiary or affiliate of an ETP Holder that is in the securities business. A subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain certain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

#### *Surveillance*

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including TIRs, to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange is able to obtain information regarding trading in the Shares, and certain of the Financial Instruments held by TIRs including securities, options on securities and indices, commodities, futures contracts, and options on futures contracts, through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect on any relevant market. The Exchange currently has in place

comprehensive surveillance sharing agreements with ICE, LME and NYMEX for the purpose of providing information in connection with trading in or related to futures contracts traded on their respective exchanges comprising the Underlying Benchmarks. The Exchange also notes that CBOT, CME and NYBOT are members of the Intermarket Surveillance Group ("ISG").

#### Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares, including risks inherent with trading the Shares during the Opening and Late Trading Sessions when the updated Indicative Value is not calculated and disseminated and suitability recommendation requirements.

Specifically, the Information Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets; (2) NYSE Arca Equities Rule 9.2(a),<sup>11</sup> which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the Indicative Value is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (5) trading information. For example, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Trust. The Exchange notes that investors purchasing Shares directly from the Funds (by delivery of the Basket Amount) will receive a prospectus. ETP Holders purchasing Shares from the Trust for resale to investors will deliver a prospectus to such investors.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses described

in each Fund's Registration Statement. The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical commodities, that the Commission has no jurisdiction over the trading of physical commodities or the futures contracts on which the value of the Shares is based.

#### Trading Halts

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.<sup>12</sup> In addition, 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 the Exchange or if an Indicative Fund Value [sic] per Share updated every 15 seconds is no longer calculated or available.<sup>13</sup>

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying securities; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

#### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>14</sup> of the Exchange Act in general and furthers the objectives of Section 6(b)(5)<sup>15</sup> in particular in that it is designed to prevent fraudulent and manipulative

<sup>12</sup> Pursuant to NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

<sup>13</sup> See NYSE Arca Equities Rule 7.12, Commentary .04. If the value of the Underlying Benchmark or the Indicative Fund Value [sic] 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 [sic] occurs. If the interruption to the dissemination the value of the Underlying Benchmark or the Indicative Fund Value [sic] 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.

<sup>14</sup> 15 U.S.C. 78f(b).

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

acts and practices, 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 transaction in securities, and, in general to protect investors and the public interest. The Exchange believes that the proposal will facilitate the listing and trading of additional types of commodity and currency-based investments that will enhance competition among market participants, to the benefit of investors and the marketplace.

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

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

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

No written comments were solicited or received with respect to the proposed rule change.

#### III. 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 Exchange 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-NYSEArca-2008-91 on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-NYSEArca-2008-91. 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

<sup>11</sup> NYSE Arca Equities Rule 9.2(a) ("Diligence as to Accounts") provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the proposed rule amendment 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 the ETP Holder believes would be useful to make a recommendation. See Securities Exchange Act Release No. 54045 (June 26, 2006), 71 FR 37971 (July 3, 2006) (SR-PCX-2005-115).

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 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-NYSEArca-2008-91 and should be submitted on or before October 1, 2008.

#### IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange 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 Exchange 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 TIRs and other exchange-traded fund-like products linked to the performance of underlying currencies and commodities.<sup>18</sup> The

<sup>16</sup> In approving this 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. 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR-NYSE-2007-03) (approving the listing and trading of shares of the CurrencyShares Japanese Yen Trust); 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR-NYSE-2006-35) (approving the listing and trading of shares of six CurrencyShares Trusts); and 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR-NYSE-2005-65) (approving the listing and trading of shares of the Euro Currency Trust, n/k/a the CurrencyShares Euro Trust). See also, e.g., Securities Exchange Act Release Nos. 56969 (December 14, 2007), 72 FR 72424 (December 20,

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>

The Exchange proposes to list and trade the Shares pursuant to Commentary .02 to NYSE Arca Equities Rule 8.200.<sup>20</sup> NYSE Arca represents that the Shares will conform to the existing initial and continued listing criteria under such rule and must be in compliance with NYSE Arca Equities Rule 5.3 and Rule 10A-3 under the Exchange Act.

The Commission believes that the proposal to list and trade the Shares on

2007) (SR-Amex-2007-53) (approving the listing and trading of the GreenHaven Continuous Commodity Index Fund); 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); 55292 (February 14, 2007), 72 FR 8406 (February 26, 2007) (SR-Amex 2006-86) (approving the listing and trading of the PowerShares DB U.S. Dollar Index Bullish Fund and the PowerShares DB U.S. Dollar Index Bearish Fund); 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 the DB Currency Index Value Fund); 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 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).

<sup>19</sup> See, e.g., Securities Exchange Act Release Nos. 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); 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); 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 shares of the ProShares Trust); and 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).

<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.

the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,<sup>21</sup> which sets forth Congress' finding 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>22</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 Value will be disseminated at least every 15 seconds during the Exchange's Core Trading Session (9:30 a.m. to 4 p.m. Eastern Time), and the NAV of each Fund will be calculated by the Administrator and made available to all market participants at the same time.

The Exchange has noted the wide availability of information regarding the Underlying Benchmarks. For example, 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 (<http://www.lbma.org.uk>). Data regarding futures contracts and options on futures contracts in connection with the Underlying Benchmark commodities is also available from NYMEX at <http://www.nymex.com>. 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. Currency 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 applicable, the names and number of

<sup>21</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>22</sup> E-mail from Tim Malinowski, Director, NYSE Euronext, to Edward Cho and Christopher Chow, Special Counsels, Division of Trading and Markets, Commission, dated September 3, 2008 (confirming the means of dissemination of quotations and last-sale information for the Shares).



Financial Instruments and characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of each Fund. NYSE Arca will also make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the NAV per Share. In addition, the Web sites for the Funds and/or the Exchange will publish the following information: (a) The current NAV per Share daily and the prior business day's NAV per Share and the reported closing price; (b) the Bid-Asked Price; (c) calculation of the premium or discount of such price against the NAV per Share; (d) 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; (e) the prospectus; and (f) other applicable quantitative information.

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. 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 value of the underlying index or portfolio is no longer calculated or available on at least a 15-second delayed basis or the Exchange stops providing a hyperlink on its Web site to any such asset or investment value; or (2) the Indicative Value is no longer made available on at least a 15-second delayed basis.<sup>23</sup> Further, Commentary .02 to NYSE Arca Equities Rules 8.200 sets forth certain restrictions, described above, on ETP Holders acting as registered Market Makers in TIRs to facilitate surveillance.

The Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. As discussed above, trading in the Shares will be halted: (1) 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; or (2) 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 the Exchange or if an Indicative Value per Share updated every 15 seconds is no longer calculated or available. The Exchange also may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that make trading in the Shares inadvisable, including: (1) The extent to which trading is not occurring in the underlying securities; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

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 Exchange Act. The Exchange has represented that the Shares are equity securities subject to NYSE Arca'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 NYSE Arca Equities Rule 8.200(d) and Commentary .02(d) to NYSE Arca Equities Rule 8.200.

(2) The Exchange's surveillance procedures are adequate to properly monitor trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) The Exchange will distribute an Information Bulletin, the contents of which are more fully described above, to ETP Holders in connection with the trading of the Shares.

(4) The Exchange represents that the Trust is required to comply with NYSE Arca Equities Rule 5.3 and Rule 10A-3 under the Exchange Act.

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

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes that it has previously approved the listing and trading of the Shares on

Amex<sup>25</sup> and believes that the Exchange's proposal to list and trade such Shares does not appear to present any novel or significant regulatory issues that should cause it to revisit that previous finding. As mentioned above, the Shares are substantially similar to the shares of other TIRs and exchange-traded products, the shares of which are currently listed and trading in the marketplace,<sup>26</sup> and the Commission has previously approved the listing and trading of shares of other UltraFunds and UltraShort Funds based on various securities indexes.<sup>27</sup> As such, the Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such products.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Exchange Act,<sup>28</sup> that the proposed rule change (SR-NYSEArca-2008-91) 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>29</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

[FR Doc. E8-20962 Filed 9-9-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58458; File No. SR-NYSEArca-2008-95]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Net Asset Value Calculations for CurrencyShares Trusts

September 3, 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 28, 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

<sup>25</sup> See *supra* note 3. The Shares have also been approved for trading on the Exchange pursuant to UTP. See *supra* note 4.

<sup>26</sup> See *supra* note 18.

<sup>27</sup> See *supra* note 19.

<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</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>23</sup> See Commentary .02(d)(2)(ii) and (iii) to NYSE Arca Equities Rule 8.200.

<sup>24</sup> 15 U.S.C. 78s(b)(2).