

FINRA responded that under the proposed rule change, firms that previously certified on or near April 1 may continue to do so, so long as the certification is executed no later than the anniversary of the prior year's certification.¹² Furthermore, FINRA indicated that the commenter's concern appears to result from the mistaken assumption that firms that are members of both FINRA and the NYSE must couple the CEO certification with the annual compliance report that is required to be submitted each year on April 1 under Incorporated NYSE Rule 342.30. FINRA stated that a firm may choose to time the process of the CEO certification so that it coincides with the Annual Compliance Report requirement, but that the proposed rule change does not compel this outcome, thus giving a firm flexibility as to when the certification process begins and ends. In addition, FINRA indicated that the commenter did not adequately consider the needs of FINRA-only firms that have chosen a cycle other than April 1 that better meets their organizational structure and procedures.¹³

The second commenter asserted that NASD Rule 3013 is unworkable and ineffectual for small FINRA member firms and urged FINRA to adopt a small firm exemption as part of the proposal.¹⁴ The commenter stated that the provision requiring the CEO and CCO to meet to discuss and review elements related to the certification is unworkable for small firms when the CEO and CCO are the same person. FINRA indicated that it expects that a person who is both CEO and CCO of a firm will contemplate the required topics of the meeting and document that he or she has reviewed those matters.¹⁵

IV. Discussion and Findings

After careful review of the proposed rule change, the comment letters and FINRA's response to the comment letters, 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 national securities associations,¹⁶ and in particular, Section 15A(b)(6) of the Act,¹⁷ which

requires among other things, that FINRA rules 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 believes that it is reasonable for FINRA to adopt NASD Rule 3013 and IM-3013 as FINRA Rule 3130 in the Consolidated FINRA Rulebook because they have previously been found to meet statutory requirements.¹⁸

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-FINRA-2008-030) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58649; File No. SR-NYSE-2008-82]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change, as Modified by Amendment No. 1, To Modify Its Policy With Respect to Legal Opinions in Connection With Listings of Securities

September 25, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 9, 2008, New York Stock Exchange LLC ("NYSE" or "the Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On

¹⁸ See e.g. Securities Exchange Act Release No. 53509 (March 17, 2006), 71 FR 15238 (March 27, 2006) (SR-NASD-2006-036) (order approving rule change to IM-3013 finding that the proposed change furthered investor protection goals and provided clarity regarding application of the rule); Securities Exchange Act Release No. 56285 (August 17, 2007), 72 FR 48715 (August 24, 2007) (SR-NASD-2007-049) (order approving rule change to NASD Rule 3013 and IM-3013 finding that the proposed changes decreased the likelihood of fraud and manipulative acts in addition to increasing investor protection).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

September 21, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice, as amended, to solicit comments on the proposal from interested persons.

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

In its filing with the Commission, the Exchange 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, of the most significant aspects of such statements.

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 Exchange 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, 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 proposes to amend the Manual by removing the provisions throughout Chapter Seven that require issuers to supply opinions of counsel to the Exchange in connection with any initial listing application or supplemental listing application.⁴

³ In Amendment No. 1, the Exchange made technical, non-substantive corrections to Exhibits 3 and 5.

⁴ This filing deletes references to the opinion of counsel requirements from the "Reference Guide For Subsequent Listing Applications" section at the front of the Manual and replaces them with a requirement (i) furnish the Exchange with copies of opinions of counsel filed in connection with recent public offerings or (ii) if no opinions of counsel exist, provide to the Exchange a certificate of good standing from the company's jurisdiction of incorporation. In addition, the filing makes the same modification to the following sections of the Manual: 702.04 (Supporting Documents); 703.01 (part 2) (General Information); 703.02 (part 3) (Stock Split/Stock Rights/Stock Dividend Listing Process); 703.03 (Short Term Rights Offerings Relating to

¹² FINRA Letter.

¹³ *Id.*

¹⁴ IMS Letter. IMS also commented on the requirements of NASD Rule 3012, which is not part of the proposal.

¹⁵ FINRA Letter.

¹⁶ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78o-3(b)(6).

Exchange rules have long required the delivery of an opinion of counsel addressed to the Exchange in connection with each application to list securities, including applications to list additional shares of a previously listed class.⁵ The Exchange believes that its opinion requirement is duplicative of several safeguards that now exist to protect investors in listed securities. In particular, an issuer's independent auditor reviews the issuance of securities as part of its annual audit. Additionally, the underwriters of securities sold in a public offering receive legal opinions as to the validity of the issuance of the securities they purchase, as well as performing their own due diligence on the company and the securities. Furthermore, a legal opinion as to the legality of the issuance of the securities being registered is delivered to the SEC in connection with the filing of any registration statement. Accordingly, the Exchange proposes to

Listed Securities Listing Process); 703.04 (Public Offerings and Private Placement of Common Stock Listing Process); 703.05 (Preferred Stock Offerings Listing Process); 703.06 (Debt Securities Offerings Listing Process); 703.07 (Reserves for Convertible Securities Listing Process); 703.08 (Mergers, Acquisitions and Other Business Combinations Listing Process); 703.09 (Stock Option, Stock Purchase and Other Remuneration Plans Listing Process); 703.10 (Technical Original Listing Process); 703.11 (Supplemental Listing Process); 703.12 (Warrants Listing Standards); 703.13 ("Special Stocks" Listing Process (Stocks Which Have Periodic Increases in Conversion Rate Into Common Stock)); 703.14 (Voting Trust Certificate Listing Process); and 903.01 (Format of Original Listing Application).

⁵In connection with the listing of equity securities, including rights, warrants, preferred stock, options, etc., the required opinion (as set forth in Section 702.04) relates to: (i) The legality of organization of the company; (ii) The authorization of the issuance of the securities for which listing application is made; (iii) the validity of such securities; (iv) whether shares are, or will be when issued, fully-paid and non-assessable; (v) whether shareholders are personally liable under the laws of the jurisdiction in which the company is organized and the jurisdiction in which its principal place of business is located; (vi) the date and nature of any order or proceeding of any Federal or State regulatory authority prerequisite to issuance of any unissued securities covered by the application and, if such steps have not been completed, the present status thereof; (vii) whether the shares require registration under the Federal securities laws and, if so, a statement that the shares are so registered; and (viii) if counsel, any partner of such counsel, or any member of a firm rendering the opinion is a director or officer of the company, that fact is required to be disclosed in the opinion.

In the case of debt securities, Section 703.06(G) requires an opinion of counsel addressing: (i) The legality of organization of the company; (ii) the authorization by the Board of Directors, in accordance with Exchange policy, of the issuance and listing of the securities for which the listing application is made; (iii) the validity of such securities; qualification of the indenture under the Trust Indenture Act of 1939; and (iv) effectiveness of registration of the securities under the Securities Act of 1933, or, if not registered, the reasons why not.

end its policy of requiring legal opinions in connection with listing applications, including applications to list additional shares of a previously listed class. In lieu of the existing opinion requirements, the Exchange will require issuers to (i) furnish the Exchange with copies of opinions of counsel filed in connection with recent public offerings or (ii) if no opinions of counsel exist, provide to the Exchange a certificate of good standing from the company's jurisdiction of incorporation.⁶

The Exchange notes that the Commission approved a rule filing by the American Stock Exchange (the "Amex") in 2000 to eliminate opinion requirements from the Amex Company Guide under the same conditions the Exchange is proposing in this filing.⁷ Additionally, to the Exchange's knowledge, Nasdaq does not require legal opinions in connection with new listings. As such, the Exchange believes that it is appropriate to conform its listing procedure in this regard with those of its direct competitors. In doing so, the Exchange will avoid the possibility of any competitive harm arising out of the imposition of this additional burden on issuers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6⁸ of the Act in general and furthers the objectives of Section 6(b)(5)⁹ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments, and to 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 proposed amendment specifically seeks to remove impediments to and perfect the mechanisms of a free and open market by conforming the Exchange's listing procedures to those of Nasdaq and the Amex, thereby eliminating any competitive disadvantage the Exchange may suffer as a result of imposing a legal opinion requirement with respect to securities listings. In addition, the Exchange's procedures will continue to protect the interests of investors by imposing requirements that will ensure

⁶The Exchange will also put companies on notice of this requirement by including a reference to it in the checklist of required documentation sent out to listing applicants and included on the Exchange's Web site. See the revised list of required documentation included in Exhibit 3.

⁷ See Securities Exchange Act Release No. 42539 (March 17, 2000), 65 FR 15672 (March 23, 2000) (SR-Amex-99-39).

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

that listed companies are duly and validly organized and in good standing in their jurisdiction of incorporation.

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 Act.

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

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has taken effect upon filing pursuant to Section 19(b)(3)(A) of the Act.¹⁰

The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change as required by Rule 19b-4(f)(6).¹¹

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. 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 Act. Comments may be submitted by any of the following methods:

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 C.F.R. 240.19b-4(f)(6).

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. Please include File Number SR-NYSE-2008-82 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-NYSE-2008-82. 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 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 self-regulatory organization. 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-NYSE-2008-82 and should be submitted on or before October 23, 2008.

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

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58647; File No. SR-NYSEArca-2008-99]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the ProShares Trust II

September 25, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 18, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I and II 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

Pursuant to the provisions of Section 19(b)(1) of the Exchange Act,³ NYSE Arca, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), is submitting this proposed rule change in connection with the listing and trading on the Exchange of shares ("Shares") of fourteen (14) funds ("Funds") of ProShares Trust II (formerly known as Commodities & Currency Trust) ("Trust") based on several currencies, commodities and commodities indexes, relating to the names of the Trust and the Funds, the Funds' Web site disclosure relating to the availability of information regarding the Shares, and the expected price of the Shares at commencement of trading. The text of the proposed rule change is available on the Exchange's Web site at www.nyse.com, at the Exchange's principal office and at the Commission's Public Reference Room.

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 IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, 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 Commission has approved the listing of the Shares on the Exchange pursuant to Section 19(b)(2)⁴ of the Exchange Act. The Exchange intends to list and trade the Shares 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").⁵ The Commission previously approved the Shares for listing on the American Stock Exchange LLC ("Amex")⁶ and for trading on the Exchange pursuant to UTP.⁷ The Exchange is filing this proposal to reflect changes to the names of the Trust and the Funds, to clarify the Funds' Web site disclosure relating to the availability of information regarding the Shares, and to correct a representation in the NYSE Arca Order regarding the expected price of the Shares at commencement of trading. Additional information regarding the Funds and the Trust is included in the NYSE Arca Order and the Amex Order.

In the NYSE Arca Order, the Commission approved listing on the Exchange of the following Funds of the Trust (formerly known as Commodities & Currency Trust): (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. The Trust has advised

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 58457 (September 3, 2008), 73 FR 52711 (September 10, 2008) (SR-NYSEArca-2008-91) ("NYSE Arca Order").

⁶ See Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 (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 Order").

⁷ See Securities Exchange Act Release No. 58162 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR-NYSEArca-2008-73).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

¹² 17 CFR 200.30-3(a)(12).