

By the Commission.

**Elizabeth M. Murphy,**  
*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61953; File No. SR-NYSEArca-2010-07]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of Proposed Rule Change Relating to Listing of AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF

April 21, 2010.

On February 23, 2010, 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 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of the AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF (the "Fund") under NYSE Arca Equities Rule 8.600 (Managed Fund Shares). The proposed rule change was published in the **Federal Register** on March 10, 2010.<sup>3</sup> No comments were received on the proposal. On April 9, 2010, the Exchange withdrew the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>4</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61947; File No. SR-NYSE-2010-18]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change To Amend the Bylaws of NYSE Euronext To Adopt a Majority Voting Standard in Uncontested Elections of Directors

April 20, 2010.

On March 5, 2010, 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 amend the By-Laws of its parent corporation, NYSE Euronext ("Corporation"). The proposed rule change was published for comment in the **Federal Register** on March 18, 2010.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

On behalf of the Corporation, NYSE proposed to make certain amendments to the Corporation's By-Laws to modify its direct election procedures. Under the existing By-Laws, directors are elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Under the Corporation's corporate governance guidelines previously adopted by the Board, however, any director nominee in an uncontested election (being an election in which the number of nominees equals the number of directors to be elected) who receives a greater number of "withheld" votes than "for" votes (including any "against" votes if that option were to be made available on the proxy card) must immediately tender his or her resignation from the Board.

NYSE proposed to amend the Corporation's By-Laws to add an explicit majority voting provision for uncontested director elections that would replace the plurality vote standard for such elections that is currently in the By-Laws. Contested elections would remain subject to the plurality standard.

Under the proposed amendment to the Bylaws, the proxy card would change for an uncontested election, and the stockholders would be given the choice to vote "for," "against" or "abstain" with respect to each director nominee individually. In such an election, each director would be elected by the vote of the majority of the votes cast with respect to such director's election, meaning that the number of votes cast "for" such director's election exceeded the number of votes cast "against" that director's election (with "abstentions" not counted as a vote either "for" or "against" such director's election). If any incumbent director fails to receive a majority of the votes cast,

such director would be required to tender his or her resignation to the Nominating and Governance Committee of the Board (or another committee designated by the Board), and such committee would recommend to the Board whether to accept or reject such resignation or whether other action should be taken. The Board would then act on the recommendation of such committee and publicly disclose its decision regarding the tendered resignation and the rationale behind the decision.<sup>4</sup>

Pursuant to the proposed amendment to the By-Laws, if the Board accepts a director's resignation as part of the process described above for uncontested elections, or if a nominee for director is not elected and the nominee is not an incumbent director, the Board may (i) fill the remaining vacancy as provided in Section 3.6 of the By-Laws and Article VI, Section 6 of the Certificate of Incorporation (involving a majority vote of the remaining directors then in office, though less than a quorum, or by the sole remaining director) or (ii) decrease the size of the Board as provided in Section 3.1 of the Bylaws and Article VI, Section 3 of the Certificate of Incorporation (involving adoption of a resolution by two-thirds of the directors then in office).

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.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>6</sup> which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply and to enforce compliance by its members and persons associated with its members with the Act. The Commission also finds that the

<sup>4</sup> The proposed amendment to the Bylaws also provides that a director who tenders his or her resignation would not participate in the recommendation by the Nominating and Governance Committee or the Board of Directors action regarding whether to accept the tendered resignation. If each member of the Nominating and Governance Committee fails to receive a majority of the votes cast in the same uncontested election, then the independent directors who received a majority of the votes cast in such election must appoint a committee among themselves to consider the tendered resignation and recommend to the Board whether to accept it. However, if the only directors who received a majority of the votes cast in such election constitute three or fewer directors, all directors may participate in the action regarding whether to accept the tendered resignation.

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78b(1).

<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. 61642 (March 3, 2010), 75 FR 11216.

<sup>4</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>3</sup> See Securities Exchange Act Release No. 61694 (March 11, 2010), 75 FR 13170.

proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>7</sup> which requires that the rules of the exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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 believes that the proposed rule change to amend the Corporation's By-Laws to adopt a majority vote standard for uncontested elections is consistent with the Act. The Commission believes that the proposed rule change is designed to allow the members of the Corporation's Board of Directors to be elected in a manner that closely reflects the desires of its shareholders, while also providing a process for addressing the circumstance when a director fails to receive a majority of votes in an uncontested election.<sup>8</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSE-2010-18) be, and it hereby is, approved.

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

**Florence E. Harmon,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61946; File No. SR-CBOE-2010-032]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Remove a Feature and Revise Outdated Text Regarding Certain Execution Rules

April 20, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on April 5, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or the

"Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 is proposing to eliminate a feature and revise outdated text regarding certain of its execution rules. The text of the proposed rule change is available on CBOE's Web site at <http://www.cboe.org>, on the Commission's Web site at <http://www.sec.gov>, 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 those 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 Exchange is proposing to eliminate a feature and revise outdated text regarding certain of its execution rules.

In August 2008,<sup>5</sup> the Exchange received Securities and Exchange Commission ("Commission") approval of a rule change to give certain non-broker-dealer orders (identified as "Voluntary Professional" orders) the priority given broker-dealer orders rather than the priority given to public

customer orders. In December 2009,<sup>6</sup> the Exchange received Commission approval of a rule change to give certain other non-broker-dealer orders (identified as "Professional" orders) the priority given broker-dealer orders rather than the priority given to public customer orders. The rules changed the execution priority in various Exchange execution rules as they existed in August 2008 and December 2009, respectively. After reviewing its execution rules, the Exchange has determined to eliminate a feature within its execution rules pertaining to customer-to-customer immediate cross orders related to Voluntary Professionals and Professionals.

Specifically, the Exchange is proposing to amend the execution rules as follows:

Rule 6.74A.09 pertains to customer-to-customer immediate cross orders. Under this provision, the Exchange may determine whether the customer-to-customer immediate cross functionality will be available on a class-by-class basis. If the functionality is available, an agency order for the account of a non-broker-dealer customer may be paired with a solicited order for the account of a non-broker-dealer customer and such orders will be crossed without any auction exposure period, provided certain conditions are met. For purposes of this provision, the rule provides that Voluntary Professional and Professional orders may be considered customer agency orders or solicited orders.<sup>7</sup> However, the system does not currently recognize Voluntary Professional and Professional orders as customer orders for purposes of the customer-to-customer immediate cross. Thus, the proposed rule change narrows the definition of customer-to-customer immediate cross orders to only public customer orders that are not Voluntary Professionals or Professionals, which is consistent with the current operation of the system. The rule will continue to provide that customer-to-customer immediate cross orders cannot be executed at the same price as any resting customer orders (*i.e.*, non-broker-dealer orders that are not Voluntary Professional or Professional orders).<sup>8</sup>

<sup>6</sup> Securities Exchange Act Release No. 61198 (December 17, 2009), 74 FR 68880 (December 29, 2009) (SR-CBOE-2009-078).

<sup>7</sup> See cross reference to Rule 6.74A.09 in Rule 1.1(ff) and (ggg).

<sup>8</sup> Under CBOE Rules 6.45A.01 through .02 and 6.45B.01 through .02, members are required to expose trading interest to the market before executing agency orders as principal or before executing agency orders against orders that were solicited from other broker-dealers (*i.e.*, proprietary and solicited crossing transactions). However, the CBOE options rules do not contain any limitations

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

<sup>8</sup> The Commission notes that NYSE represented that the proposed change would not affect the voting limitations contained in the Corporation's certificate of incorporation.

<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.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> Securities Exchange Act Release No. 58327 (August 7, 2008), 73 FR 47988 (August 15, 2008) (SR-CBOE-2008-09).