

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59051; File No. SR-NYSEArca-2008-123)

December 4, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Trust Certificates

On November 4, 2008, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities” or “Corporation”), 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 relating to the listing and trading of Trust Certificates. On November 6, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 thereto, was published in the Federal Register on November 18, 2008 for a 15-day comment period.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto, on an accelerated basis.

I. Description of the Proposal

The Exchange proposes to adopt new NYSE Arca Equities Rule 5.2(j)(7) to permit the listing and trading of Trust Certificates and amend its Schedule of Fees and Charges for Exchange Services (“Fee Schedule”) to incorporate Trust Certificates for purposes of such schedule. In addition, pursuant to proposed NYSE Arca Equities Rule 5.2(j)(7), the Exchange proposes to list 14 issues of Trust Certificates (“Amex Trust Certificates”), which are currently

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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> See Securities Exchange Act Release No. 58920 (November 7, 2008), 73 FR 68479 (“Notice”).

listed and traded on NYSE Alternext US LLC (formerly known as the American Stock Exchange LLC) (“NYSE Alternext US”).<sup>4</sup>

A. Proposed NYSE Arca Equities Rule 5.2(j)(7) and Amendment to Fee Schedule

Trust Certificates are certificates representing an interest in a special purpose trust (“Trust”) created pursuant to a trust agreement. The Trust will only issue Trust Certificates, which may or may not provide for the repayment of the original principal investment amount. The sole purpose of the Trust will be to invest the proceeds from its initial public offering to provide for a return linked to the performance of specified assets and to engage only in activities incidental to these objectives. Trust Certificates pay an amount at maturity based upon the performance of specified assets, as described below.

Proposed NYSE Arca Equities Rule 5.2(j)(7) provides that the Exchange will consider the trading, whether by listing or pursuant to unlisted trading privileges, of Trust Certificates based on the following: (1) an underlying index or indexes of equity securities (an “Equity Index Reference Asset”); (2) instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration date (i.e., European style), entitling the holder to a cash settlement in U.S. dollars to the extent that

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<sup>4</sup> The 14 issues of Trust Certificates, the descriptions of which may be found in the Notice and respective prospectuses, are: (1) Safety First Trust Series 2007-1 (AZP); (2) Safety First Investments TIERS® Principal-Protected Minimum Return Trust Certificates, Series Nasdaq 2003-13 (NAS); (3) Safety First Trust Series 2008-1 (ATA); (4) Safety First Trust Series 2007-2 (AFO); (5) Safety First Investments TIERS® Principal-Protected Minimum Return Trust Certificates, Series S&P 2003-22 (SYP); (6) Safety First Investments TIERS® Principal-Protected Minimum Return Trust Certificates, Series S&P 2003-23 (SPO); (7) Safety First Investments TIERS® Principal-Protected Minimum Return Trust Certificates, Series Nasdaq 2003-12 (SFH); (8) Safety First Investments TIERS® Principal-Protected Minimum Return Trust Certificates, Series Russell 2004-1 (RUD); (9) Safety First Trust Series 2008-2 (AMM); (10) Safety First Trust Series 2008-3 (AHB); (11) Safety First Trust Series 2008-4 (AHY); (12) Safety First Trust Series 2007-3 (AKE); (13) Safety First Trust Series 2007-4 (AKN); and (14) Safety First Trust Series 2006-1 (AGB). See Notice, id., at nn.9-22.

the foreign or domestic index has declined below (for put warrant) or increased above (for a call warrant) the pre-stated cash settlement value of the index (“Index Warrants”); or (3) a combination of two or more Equity Index Reference Assets or Index Warrants.

Proposed Commentary .01 to new NYSE Arca Equities Rule 5.2(j)(7) sets forth criteria for continued listing and provides that the Corporation will commence delisting or removal proceedings with respect to an issue of Trust Certificates (unless the Commission has approved the continued trading of such issue): (1) if the aggregate market value or the principal amount of the securities publicly held is less than \$400,000; (2) if the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities;<sup>5</sup> or (3) if such other event shall occur or condition exists which, in the opinion of the Corporation, makes further dealings on the Corporation inadvisable.

Proposed Commentary .02 provides that the term of the Trust, which may terminate early under certain circumstances, shall be as stated in the Trust prospectus. In addition, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus. Proposed Commentary .03 sets forth requirements applicable to the trustee of a Trust, including that the trustee must be a trust company or banking institution having substantial capital and

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<sup>5</sup> If the official index value does not change during some or all of the period when trading is occurring on NYSE Arca Marketplace (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes’ component stocks trade), then the last calculated official index value must remain available throughout NYSE Arca Marketplace trading hours. See Proposed Commentary .01(ii) to new NYSE Arca Equities Rule 5.2(j)(7).

surplus and the experience and facilities for handling a corporate trust business.<sup>6</sup> Proposed Commentary .04 provides that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Commentary .05 provides that the Exchange will implement written surveillance procedures for Trust Certificates. Proposed Commentary .06 states that Trust Certificates will be subject to the Exchange's equity trading rules. Proposed Commentary .07 provides that, prior to the commencement of trading of a particular issue of Trust Certificates listed pursuant to new NYSE Arca Equities Rule 5.2(j)(7), the Corporation will evaluate the nature and complexity of the issue and, if appropriate, distribute a circular to ETP Holders providing guidance regarding compliance responsibilities (including suitability recommendations and account approval) when handling transactions in Trust Certificates.

Proposed Commentary .08 provides that Trust Certificates may be exchangeable at the option of the holder into securities that participate in the return of the applicable underlying asset. In the event that the Trust Certificates are exchangeable at the option of the holder and contains an Index Warrant, then, the ETP Holder must ensure that the holder's account is approved for options trading in accordance with NYSE Arca Rule 9.2 to exercise such rights. Proposed Commentary .09 provides that Trust Certificates may pass-through periodic payments of interest and principle of the underlying securities. Proposed Commentary .10 provides that Trust payments may be guaranteed pursuant to a financial guaranty insurance policy, which may

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<sup>6</sup> In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee. See Proposed Commentary .03(i) to new NYSE Arca Equities Rule 5.2(j)(7). In addition, no change is to be made in the trustee of a listed issue without prior notice to, and approval of, the Corporation. See Proposed Commentary .03(ii) to new NYSE Arca Equities Rule 5.2(j)(7).

include swap agreements. Lastly, proposed Commentary .11 provides that Trust Certificates may be subject to early termination or call features.

The Exchange also proposes to amend footnote 4 to the NYSE Arca Equities Fee Schedule to include Trust Certificates as “Structured Products” for purposes of such schedule.

**B. Issues of Amex Trust Certificates to be Listed**

Pursuant to proposed NYSE Arca Equities Rule 5.2(j)(7), the Exchange proposes to list and trade the Amex Trust Certificates. The Amex Trust Certificates are currently listed and traded on NYSE Alternext US. The Exchange states that: (1) it does not currently list Trust Certificates; and (2) the proposed rule change is intended only to accommodate the listing of the Amex Trust Certificates on the Exchange.<sup>7</sup> Prior to listing on the Exchange, the Amex Trust Certificates would be required to satisfy the applicable delisting procedures of NYSE Alternext US and applicable statutory and regulatory requirements, including, without limitation, Section 12 of the Exchange Act,<sup>8</sup> relating to the listing of the Amex Trust Certificates on the Exchange.<sup>9</sup> The Exchange represents that the Amex Trust Certificates satisfy the requirements of proposed NYSE Arca Equities Rule 5.2(j)(7) and thereby qualify for listing on the Exchange.

Descriptions of the Amex Trust Certificates are included in their respective prospectuses<sup>10</sup> and in the Notice.

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<sup>7</sup> The Exchange represents that it will not list an additional issue of Trust Certificates unless the Exchange has previously filed with the Commission a proposed rule change pursuant to Rule 19b-4 under the Act to permit such listing.

<sup>8</sup> 15 U.S.C. 78(l).

<sup>9</sup> The Exchange will seek the voluntary consent of the issuer of the Amex Trust Certificates to be delisted from NYSE Alternext US and listed on the Exchange. The Exchange notes that its approval of the Amex Trust Certificates’ listing applications would be required prior to listing.

<sup>10</sup> See supra note 4.

C. Exchange Rules Applicable to Trust Certificates

Trust Certificates will be subject to all Exchange rules governing the trading of equity securities. The Exchange's equity margin rules will apply to transactions in Trust Certificates. Trust Certificates will trade during trading hours set forth in NYSE Arca Equities Rule 7.34(a).<sup>11</sup>

The Exchange notes that none of the indexes related to the Amex Trust Certificates described above is maintained by a broker-dealer. The Exchange notes further that, with respect to such indexes, any advisory committee, supervisory board, or similar entity that advises an index licensor or administrator or that makes decisions regarding the index composition, methodology, and related matters must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable index.

D. Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Trust Certificates. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Trust Certificates inadvisable. These may include: (1) the extent to which trading is not occurring in

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<sup>11</sup> Pursuant to NYSE Arca Equities Rule 7.34(a), the NYSE Arca Marketplace will have three trading sessions each day the Corporation is open for business unless otherwise determined by the Corporation: (1) Opening Session, from 1:00:00 a.m. (Pacific Time) until the commencement of the Core Trading Session (the Opening Auction and the Market Order Auction shall occur during the Opening Session); (2) Core Trading Session, for each security from 6:30:00 a.m. (Pacific Time) or at the conclusion of the Market Order Auction, whichever comes later, until 1:00:00 p.m. (Pacific Time); and (3) Late Trading Session, from the conclusion of the Core Trading Session until 5:00:00 p.m. (Pacific Time).

the underlying securities; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>12</sup>

E. Information Dissemination

The value of the applicable index relating to an issue of the Trust Certificates, or, for Trust Certificates based on multiple indexes, the composite value of the indexes, will be calculated and disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities.<sup>13</sup> The values of the indexes upon which the applicable Amex Trust Certificates are based are widely disseminated by major market data vendors and financial publications. In addition, the Exchange will disseminate the composite index values, as applicable, via the Consolidated Tape. If the index or composite index value applicable to an issue of Trust Certificates is not being disseminated as required, the Exchange may halt trading during the day on which the interruption first occurs. If such interruption 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. Further, quotation and last-sale information will be disseminated by the Exchange via the Consolidated Tape.

F. Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Trust Certificates, to monitor trading in the securities. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the securities in all trading sessions and to deter and detect violations of Exchange

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<sup>12</sup> See Commentary .04 to NYSE Arca Equities Rule 7.12.

<sup>13</sup> For issues of Trust Certificates based on multiple indexes, the Exchange will cause to be calculated and disseminated a composite value for such indexes.

rules and all applicable federal securities laws.<sup>14</sup> The Exchange's current trading surveillance focuses on detecting when securities trade 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. In addition, the Exchange states that it has a generally policy prohibiting the distribution of material, non-public information by its employees.

The Exchange also states that it may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of ISG.<sup>15</sup> The Exchange notes, however, that some of the index components on which the Trust Certificates are valued may trade on markets that are not ISG members. The Exchange notes further that, as of October 30, 2008, with the exceptions noted below, for all Amex Trust Certificates described above, no more than 20% of the dollar weight in the aggregate of the index or composite indexes, as applicable, consists of component securities having their primary trading market outside the United States on foreign trading markets that are not members of ISG or parties to comprehensive surveillance sharing agreements with the Exchange. As of October 30, 2008, for AZP, ATA, AHB and AKN,<sup>16</sup> 20.56% of the applicable composite index weights consisted of non-U.S. securities having a primary trading market that is not an ISG member or is not a party to a comprehensive surveillance sharing agreement with the Exchange.

#### G. Information Bulletin

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<sup>14</sup> E-mail from Michael Cavalier, Chief Counsel, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated November 20, 2008.

<sup>15</sup> For a list of current members of the ISG, see [www.isgportal.org](http://www.isgportal.org).

<sup>16</sup> AZP, ATA, AHB and AKN are the trading symbols for Safety First Trust Series 2007-1, Safety First Trust Series 2008-1, Safety First Trust Series 2008-3, and Safety First Trust Series 2007-4, respectively. See Notice, supra note 3; see also supra note 4.



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 an issue of Trust Certificates and suitability recommendation requirements. Specifically, the Information Bulletin will discuss the following: (1) the procedures for purchases and redemptions of Trust Certificates; (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading an issue of Trust Certificates; and (3) trading information. In addition, the Information Bulletin will reference that an issue of Trust Certificates is subject to various fees and expenses described in the applicable prospectus.

## 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>17</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Exchange Act,<sup>19</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.

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<sup>17</sup> 15 U.S.C. 78f.

<sup>18</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>19</sup> 15 U.S.C. 78f(b)(5).

With respect to the proposal to adopt new NYSE Arca Equities Rule 5.2(j)(7), the Commission notes that the definitions of Equity Index Reference Asset and Index Warrants are substantively identical to the definitions assigned to Equity Reference Asset, with respect to Equity Index-Linked Securities under NYSE Arca Equities Rule 5.2(j)(6), and Index Warrants, as defined in NYSE Arca Equities Rule 8.2(e), respectively. In addition, the Commission notes that proposed NYSE Arca Equities Rule 5.2(j)(7) is solely designed to accommodate the listing and trading of the Amex Trust Certificates, which are currently listed on NYSE Alternext US, on the Exchange. No Trust Certificates are currently listed on the Exchange. The Exchange represents that it will not list any additional Trust Certificates other than the Amex Trust Certificates, unless the Exchange has previously filed a proposed rule change pursuant to Rule 19b-4 under the Exchange Act to permit such listing.<sup>20</sup> The Commission believes that the proposed criteria under new NYSE Arca Equities Rule 5.2(j)(7), and in particular, the continued listing requirements under proposed Commentary .01 thereto, are reasonably designed to protect investors and the public interest. Specifically, the Exchange must commence delisting or removal proceedings with respect to an issue of Trust Certificates if: (1) the aggregate market value or the principal amount publicly held is less than \$400,000; (2) the value of the index or composite value of the indexes is no longer calculated or widely disseminated as required; or (3) such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings in Trust Certificates on the Exchange inadvisable. In addition, the Commission believes that the conforming change made to the Fee Schedule clarifies the application of the listing fees as they pertain to “Structured Products,” and specifically, Trust Certificates.

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<sup>20</sup> The Commission notes that, if the Exchange seeks to list additional Trust Certificates other than the Amex Trust Certificates in the future, additional standards such as initial listing criteria to proposed NYSE Arca Equities Rule 5.2(j)(7) may need to be incorporated.

The Commission further believes that the proposal to list and trade the Amex Trust Certificates on 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. Quotation and last-sale information regarding Trust Certificates, as well as the composite value of the indexes on which certain Units are based, will be disseminated by the Exchange via the Consolidated Tape. The value of the index or indexes, as the case may be, will also be widely disseminated by major market data vendors and financial publications. The Exchange represents that the value of the applicable index relating to an issue of the Amex Trust Certificates, or, for Amex Trust Certificates based on multiple indexes, the composite value of the indexes, will be calculated and disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities.<sup>22</sup>

The Commission also believes that the proposal to list and trade the Amex Trust Certificates is reasonably designed to promote fair disclosure of information that may be necessary to price the Amex Trust Certificates appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that, if the index or composite index value applicable to an issue of Trust Certificates is not being disseminated as required, the Exchange may halt trading during the day on which the interruption first occurs. If such interruption persists past the trading day in which it occurred, the Exchange will halt trading

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

<sup>22</sup> See supra note 5.

no later than the beginning of the trading day following the interruption. In addition, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in Trust Certificates. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in Trust Certificates 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.

The Exchange has further represented that none of the indexes related to the Amex Trust Certificates is maintained by a broker-dealer. The Exchange notes that, with respect to such indexes, any advisory committee, supervisory board, or similar entity that advises an index licensor or administrator or that makes decisions regarding the index composition, methodology, and related matters must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable index.

The Commission further believes that the trading rules and procedures to which the Amex Trust Certificates will be subject pursuant to this proposal are consistent with the Exchange Act. The Exchange has represented that the Amex Trust Certificates will be subject to all Exchange's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

- (1) The Amex Trust Certificates satisfy the requirements of proposed NYSE Arca Equities Rule 5.2(j)(7), which includes the continued listing criteria for Trust Certificates.
- (2) The Exchange's surveillance procedures are adequate to properly monitor trading

of Trust Certificates in all trading sessions and to deter and detect violations of Exchange rules and all applicable federal securities laws.

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

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

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act<sup>23</sup> and the rules and regulations thereunder applicable to a national securities exchange.

### III. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>24</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 proposed NYSE Arca Equities Rule 5.2(j)(7) is solely designed to accommodate the listing and trading of the Amex Trust Certificates, which are currently listed and trading on NYSE Alternext US, on the Exchange. The Commission further notes that, if the Exchange seeks to list and trade, or trade pursuant to unlisted trading privileges, any additional series of Trust Certificates, the Exchange is required to file a proposed rule change with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder. The Commission finds that the proposed rule change would benefit investors by permitting the listing of the Amex Trust Certificates on the Exchange and providing investors and other market participants seamless and uninterrupted trading

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<sup>23</sup> 15 U.S.C. 78f(b)(5).

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

opportunities in the Amex Trust Certificates, while maintaining sufficient minimum standards with respect to the continued trading of such Trust Certificates.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>25</sup> that the proposed rule change (SR-NYSEArca-2008-123), as modified by Amendment No. 1 thereto, 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>26</sup>

Florence E. Harmon  
Acting Secretary

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<sup>25</sup> Id.

<sup>26</sup> 17 CFR 200.30-3(a)(12).