

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56924; File No. SR-NYSEArca-2007-98)

December 7, 2007

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to the Definition of and Listing Standards for Equity-Linked Notes under NYSE Arca Equities Rules 5.1(b)(14) and 5.2(j)(2)

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on September 25, 2007, 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”) the proposed rule changes as described in Items I and II below, which items have been prepared by the Exchange. On October 23, 2007, the Exchange submitted Amendment No. 1 to the proposed rule change. On December 5, 2007, the Exchange submitted Amendment No. 2 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and is granting accelerated approval to the proposed rule change.

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, proposes to amend its rules governing NYSE Arca, LLC (also referred to as the “NYSE Arca Marketplace”), which is the equities trading facility of NYSE Arca Equities. The Exchange is proposing to amend NYSE Arca Equities Rules 5.1(b)(14), the Exchange’s definition of Equity-Linked Notes

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

(“ELNs”), and 5.2(j)(2), the Exchange’s listing standards for ELNs, to provide for greater flexibility in the listing criteria for ELNs.

The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 NYSE Arca 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 NYSE Arca Equities Rules 5.1(b)(14), the Exchange’s definition of ELNs, and 5.2(j)(2), the Exchange’s listing standards for ELNs, to provide for greater flexibility in the listing criteria for ELNs, as set forth below.<sup>4</sup> The Exchange notes that the Commission has approved similar proposals by the American Stock Exchange LLC (“Amex”).<sup>5</sup>

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<sup>4</sup> NYSE Arca Equities Rule 5.2(j)(2) was approved by the Commission in September 1996, and was amended once in 2004. See Securities Exchange Act Release Nos. 37648 (September 5, 1996), 61 FR 48195 (September 12, 1996) (SR-PSE-96-23) and 50319 (September 7, 2004), 69 FR 55204 (September 13, 2004) (SR-PCX-2004-75).

<sup>5</sup> Amex’s initial listing standards for ELNs are set forth in Section 107A of the Amex Company Guide, which was approved by the Commission in March 1990, and Section 107B of the Amex Company Guide, which was approved by the Commission in May 1993. These sections have been amended several times. The filings that are relevant to the topics discussed in this filing are as follows. See Securities Exchange Act Release

## Number of Linked Securities

NYSE Arca Equities Rule 5.1(b)(14) currently defines ELNs as notes that are linked, in whole or in part, to the market performance of a common stock, non-convertible preferred stock, or sponsored American Depositary Receipts (“ADRs”), which may also be referred to as American Depositary Shares (“ADSs”), overlying such equity securities. The Exchange proposes to amend the definition to simply state that ELNs are defined as notes that are linked, in whole or in part, to the market performance of up to thirty common stocks or non-convertible preferred stocks. This change conforms to Section 107B of the Amex Company Guide.<sup>6</sup> The Exchange proposes to expand the number of stocks that may be linked to ELNs in order to accommodate the varying types of ELN products that are currently offered in the marketplace. The Exchange believes that expanding the number of stocks that may be linked to ELNs will also provide investors with enhanced investment flexibility. The Exchange also believes that there would be no investor protection concerns with expanding the number of stocks linked to ELNs because each linked stock is required to individually satisfy the applicable listing standards set forth in Rule 5.2(j)(2). The Exchange also proposes to delete the reference to ADRs in Rule 5.1(b)(14), as such matter is covered in the listing standards.

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Nos. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (SR-Amex-89-29) (“Amex March 1990 Release”); 32343 (May 20, 1993), 58 FR 30833 (May 27, 1993) (SR-Amex-92-42) (“Amex May 1993 Release”); 34549 (August 18, 1994), 59 FR 43873 (August 25, 1994) (SR-Amex-93-46) (“Amex August 1994 Release”); 36990 (March 20, 1996), 61 FR 13545 (March 27, 1996) (SR-Amex-95-44) (“Amex March 1996 Release”); 37783 (October 4, 1996), 61 FR 53246 (October 10, 1996) (SR-Amex-96-31) (“Amex October 1996 Release”); 47055 (December 19, 2002), 67 FR 79669 (December 30, 2002) (SR-Amex-2002-110) (“Amex December 2002 Release”); and 55733 (May 10, 2007), 72 FR 27602 (May 16, 2007) (SR-Amex-2007-34) (“Amex May 2007 Release”) (collectively “Amex Releases”).

<sup>6</sup> See Amex December 2002 Release, note 5, supra.

## Issuer Listing Standards

Rule 5.2(j)(2)(A) currently provides that the issuer of ELNs must be an entity that is listed on a national securities exchange (or an affiliate of a listed company), with a minimum net worth of \$150 million. Further, Rule 5.2(j)(2)(A) provides that the market value of an ELN offering, when combined with the market value of all other ELN offerings previously completed by the issuer and currently traded on a national securities exchange, may not be greater than 25% of the issuer's net worth at the time of issuance.

The Exchange proposes to amend the issuer listing standards under Rule 5.2(j)(2)(A) to provide for alternative minimum tangible net worth criteria for issuers of ELNs, similar to Section 107B(c) of the Amex Company Guide.<sup>7</sup> Under the proposed Rule, an issuer with minimum tangible net worth in excess of \$250 million and otherwise substantially exceeds the pre-tax income from continuing operations of at least \$750,000 in its last fiscal year, or in two of its last three fiscal years will not be limited to offerings of ELNs that do not exceed 25% of its net worth. The Exchange believes that this strikes an appropriate balance between the Exchange's responsiveness to innovations in the securities markets and its need to ensure the protection of investors and the public interest. Moreover, the Exchange believes that these changes will not have an adverse impact on the market for ELNs nor its investors since issuers with the lower net worth of \$150 million will still be required to limit the amount of their ELN offerings to 25% of their net worth.

ELNs are dependent upon the individual credit of the issuer. This heightens the possibility that a holder of an ELN may not be able to receive full cash settlement at maturity. The Exchange believes that the proposed alternative net worth standard above, in addition to the

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<sup>7</sup> See Amex October 1996 Release, note 5, supra.

proposed additional financial requirements set forth below, reasonably address this additional credit risk, and may even serve to minimize this risk.

The Exchange also proposes to amend the issuer listing standards under Rule 5.2(j)(2)(A) to apply additional financial standards to issuers, in addition to net worth, which correspond to those set forth in Section 107A(a) of the Amex Company Guide.<sup>8</sup> Specifically, the Exchange proposes to amend the issuer listing standards to require that an issuer of ELNs must have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In addition, the Exchange proposes to amend the issuer listing standards to require that an issuer of ELNs must have one of the following: (i) pre-tax income from continuing operations of at least \$750,000 in its last fiscal year, or in two of its last three fiscal years; (ii) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (iii) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

The Exchange proposes these additional financial standards to ensure that only the more financially sound companies will be eligible to have their ELNs listed on the Exchange. The Exchange believes that this is important considering the additional or contingent financial obligations created by ELNs, and should serve to protect investors and the public interest by ensuring that the ELNs listed on the Exchange have met predetermined financial criteria set by the Exchange.

#### ELN Listing Standards

Rule 5.2(j)(2)(B) currently provides that an issue of ELNs must have a minimum public distribution of one million ELNs, a minimum of 400 holders (provided, however, that if the ELN

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<sup>8</sup> See Amex March 1990 Release, note 5, supra.

is traded in \$1,000 denominations, there is no minimum number of holders), a minimum market value of \$4 million, and a minimum term of one year.

The Exchange proposes to add an exception to the minimum public distribution standard in Rule 5.2(j)(2)(B) to provide that if the ELN is traded in \$1,000 denominations, there is no minimum public distribution requirement. This change corresponds to Section 107A(b) of the Amex Company Guide.<sup>9</sup> The Exchange notes that, without the exception to the one million ELN minimum public distribution requirement, the Exchange would be unable to list ELNs in \$1,000 dollar denominations having a market value of less than \$1 billion. The Exchange believes that the proposed exception is a reasonable accommodation for those issuances in \$1,000 denominations.

In addition, the Exchange proposes to add an exception to the holders requirement in Rule 5.2(j)(2)(B) to provide that if the ELNs are redeemable at the option of the holders thereof on at least a weekly basis, there is no minimum number of holders. This change also corresponds to Section 107A(b) of the Amex Company Guide.<sup>10</sup> The Exchange recently submitted a proposal to the Commission to add this exception to NYSE Arca Equities Rule 5.2(j)(6) (“Index-Linked Securities”),<sup>11</sup> which was based on a rule proposal by the New York Stock Exchange LLC recently approved by the Commission.<sup>12</sup> The Exchange also proposes to clarify that the holders requirement applies to “public” holders only.

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<sup>9</sup> See Amex May 2007 Release, note 5, supra.

<sup>10</sup> Id.

<sup>11</sup> See Securities Exchange Act Release No. 56593 (October 1, 2007), 72 FR 57362 (October 9, 2007) (SR-NYSEArca-2007-96).

<sup>12</sup> See Securities Exchange Act Release No. 56271 (August 16, 2007), 72 FR 47107 (August 22, 2007) (SR-NYSE-2007-74).

The Exchange believes that a weekly redemption right will ensure a strong correlation between the market price of the ELNs and the performance of the underlying asset, such as a single security or basket of securities and/or securities index, as holders will be unlikely to sell their securities for less than their redemption value if they have a weekly right to redeem such securities for their full value. In addition, in the case of certain ELNs with a weekly redemption feature, the issuer may have the ability to issue new ELNs from time to time at market prices prevailing at the time of sale, at prices related to market prices, or at negotiated prices. This provides a ready supply of new ELNs, thereby lessening the possibility that the market price of such securities will be affected by a scarcity of available ELNs for sale. The Exchange believes that it also assists in maintaining a strong correlation between the market price and the indicative value, as investors will be unlikely to pay more than the indicative value in the open market if they can acquire ELNs from the issuer at that price.

The Exchange believes that the ability to list ELNs with these characteristics without any minimum number of units issued or holders is important to the successful listing of such securities. Issuers issuing these types of ELNs generally do not intend to do so by way of an underwritten offering. Rather, the distribution arrangement is analogous to that of an exchange traded fund issuance, in that the issue is launched without any significant distribution event and the float increases over time as investors purchase additional securities from the issuer at the then indicative value. Investors will generally seek to purchase the securities at a point when the underlying index is at a level that they perceive as providing an attractive growth opportunity. In the context of such a distribution arrangement, it is difficult for an issuer to guarantee its ability to sell a specific number of units on the listing date. However, the Exchange believes that this difficulty in ensuring the sale of one million units or 400 public holders on the listing date is not

indicative of a likely long-term lack of liquidity in the securities or, for the reasons set forth in the prior paragraph, of a difficulty in establishing a pricing equilibrium in the securities or a successful two-sided market.

### The Linked Securities

Rule 5.2(j)(2)(C) currently provides minimum standards applicable to the linked securities and the issuers of such securities. The Rule currently provides that the ELNs must be issued by either: (i) a U.S. company or (ii) a non-U.S. company that meets certain additional standards. The Exchange proposes to amend the language in the Rule to indicate that an issue of ELNs may be linked to more than one security and, therefore, more than one issuer of a security, in accordance with the Exchange's proposed amendments to Rule 5.1(b)(14), as set forth above. In addition, the Exchange proposes to amend the requirement that the issuer be a U.S. company (in order not to have to meet additional standards of a non-U.S. company) to require that the issuer be a reporting company under the Act listed on a national securities exchange. This change corresponds to Section 107B(e) of the Amex Company Guide.<sup>13</sup> The Exchange proposes this revision in order to encompass non-U.S. companies that have reporting requirements under the federal securities laws, which better addresses the Exchange's concern regarding the public availability of financial information for the issuers of the underlying securities. The Exchange believes that such information serves to protect investors and the public interest.

In Rule 5.2(j)(2)(C) and (D), the Exchange also proposes certain minor changes in order to clarify certain language, including the language regarding common shares and American Depositary Shares ("ADSs"), generally conforming it to Section 107B(e) of the Amex Company

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<sup>13</sup> See Amex May 1993 Release, note 5, supra.



Guide.<sup>14</sup> In Rule 5.2(j)(2)(D), the Exchange also proposes to add the standard that if any non-U.S. security and related securities has less than 20% of the worldwide trading volume occurring in the U.S. market during the six month period preceding the date of listing, then the ELN may not be linked to that non-U.S. security. The Exchange believes that this standard makes sense in the context of the current Rule,<sup>15</sup> and notes that it corresponds to Section 107B(f) of the Amex Company Guide.<sup>16</sup> The Exchange believes that this additional standard is appropriate in that it limits the listing of ELNs linked to non-U.S. securities to those that have a significant amount of U.S. market trading volume, which provides reasonable assurance that the underlying non-U.S. securities are deliverable upon exercise of the ELNs.

#### Additional Changes

In Rule 5.2(j)(2)(E), the Exchange currently provides that it will distribute an information circular to ETP Holders prior to the commencement of trading of particular ELNs in order to provide guidance to ETP Holders regarding compliance responsibilities (including suitability recommendations and account approval) when handling transactions in ELNs. The Exchange proposes to amend this requirement to provide that the Exchange will evaluate the nature and complexity of the issue and, if appropriate, distribute an information circular to ETP Holders, which conforms with Section 107A of the Amex Company Guide.<sup>17</sup> In determining whether a circular is necessary, the Exchange will consider such characteristics of the issue as: unit size and

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<sup>14</sup> See Amex August 1994 Release, note 5, supra.

<sup>15</sup> The current Rule provides that the issuance of ELNs relating to underlying non-U.S. securities cannot exceed certain percentage limits of the total outstanding shares of the underlying security. These percentage limits are tied to 20%, 50% and 70% of worldwide trading volume. Therefore, the Rule as currently in effect, does not contemplate less than 20% worldwide trading volume.

<sup>16</sup> See Amex March 1996 Release, note 5, supra.

<sup>17</sup> See Amex March 1990 Release, note 5, supra.

term; cash settlement; exercise or call provisions; characteristics that may affect payment of dividends and/or appreciation potential; whether the securities are primarily of retail or institutional interest; and such other features of the issue that might entail special risks not normally associated with securities currently listed on the Exchange. The Exchange proposes this change in order to allow the Exchange greater flexibility while still protecting investors.

The Exchange also proposes to add new Rule 5.2(j)(2)(F), which provides that ELNs will be treated as equity instruments, in accordance with Section 107B(g) of the Amex Company Guide.<sup>18</sup> The Exchange proposes this change to provide clarity to its ETP Holders that ELNs will be treated as equity instruments for, among other purposes, margin treatment.

The Exchange also proposes to add that the Exchange may approve for listing and trading ELN's pursuant to Rule 19b-4(e) under the Act if the requirements of proposed Rule 5.2(j)(2) are met.<sup>19</sup> The Exchange proposes this change to clarify that this requirement applies to ELN's.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>20</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>21</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaging in regulating, clearing, settling, processing information with respect to, and facilitating transactions

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<sup>18</sup> See Amex May 1993 Release, note 5, supra.

<sup>19</sup> Telephone conference between Timothy J. Malinowski, Director, Exchange, and Michou H.M. Nguyen, Special Counsel, Division of Trading and Markets, Commission, on December 6, 2007.

<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

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.

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

No written comments were solicited, or received, with respect to the proposed rule change, by NYSE Arca.

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 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2007-98 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2007-98. 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 10:00 a.m. and 3:00 p.m. Copies of such 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-2007-98 and should be submitted by [insert date 21 days from date of publication in the Federal Register].

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 Act and the rules and regulations thereunder applicable to a national securities exchange<sup>22</sup> and, in particular, the requirements of Section 6 of the Act.<sup>23</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>24</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 foster cooperation and

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<sup>22</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>23</sup> 15 U.S.C. 78f.

<sup>24</sup> 15 U.S.C. 78f(b)(5).

coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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.

The Commission finds good cause for approving the proposed rule change prior to the 30<sup>th</sup> day after the date of publication of the notice of filing thereof in the Federal Register. The proposal seeks to conform the Exchange's rules for ELNs to the rules of the Amex that have previously been approved by the Commission.<sup>25</sup> Therefore, the Commission does not believe that the Exchange's proposal raises any novel regulatory issues. The Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for ELNs.

Therefore the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>26</sup> to approve the proposed rule change on an accelerated basis.

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<sup>25</sup> See Amex Rules 101 and 107; see also Amex Release, note 5 supra.

<sup>26</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change, as amended (SR-NYSE Arca-2007-98), 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>28</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>27</sup> 15 U.S.C. 78s(b)(2).

<sup>28</sup> 17 CFR 200.30-3(a)(12).