

*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-FINRA-2011-004 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-FINRA-2011-004. 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 website viewing and printing 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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 No. SR-FINRA-2011-004 and should be submitted on or before February 17, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Elizabeth M. Murphy,**  
Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-63737; File No. SR-NYSEArca-2010-107]

**Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to Listing and Trading Shares of the AdvisorShares Active Bear ETF**

January 19, 2011.

**I. Introduction**

On November 23, 2010, NYSE Arca, Inc. ("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 list and trade shares ("Shares") of the AdvisorShares Active Bear ETF (the "Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on December 13, 2010.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

**II. Description of the Proposal**

The Exchange proposes to list and trade the Shares pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares will be offered by AdvisorShares Trust ("Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>4</sup> The investment advisor to the Fund is AdvisorShares Investments, LLC (the "Advisor"). Ranger Alternative Management, L.P. is the sub-advisor ("Sub-Advisor") to the Fund and the portfolio manager. Foreside Fund Services LLC is the distributor for the Fund. The Bank of New York Mellon Corporation is the administrator,

<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. 63447 (December 7, 2010), 75 FR 77681 ("Notice").

<sup>4</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). On September 22, 2010, the Trust filed with the Commission Post-Effective Amendment No. 12 to Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (the "Registration Statement"). The Trust has also filed an Amended Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812-13677 dated May 28, 2010). The description of the operation of the Trust and the Fund herein is based on the Registration Statement.

custodian, transfer agent and fund accounting agent for the Fund.

The Fund's investment objective is to seek capital appreciation through short sales of domestically-traded equity securities. The Sub-Advisor seeks to achieve that objective by short selling a portfolio of liquid mid- and large-cap U.S. exchange-traded equity securities, exchange-traded funds ("ETFs") registered pursuant to the 1940 Act and exchange-traded products ("ETPs"), including exchange-traded notes ("ETNs").<sup>5</sup> The Fund generally targets composition of 20-50 equity short positions, with an average individual position size generally ranging between 2-7% of the aggregate portfolio exposure. ETPs may be used to gain exposure in instances when the Sub-Advisor has a more bearish posture with respect to the broad market and will typically range between 10-15% of the Fund's portfolio. ETFs registered pursuant to the 1940 Act or other exchange-traded products not registered pursuant to the 1940 Act will be utilized to manage exposure to broad indexes or certain sectors. The Fund may invest in U.S. government securities and U.S. Treasury zero-coupon bonds. To respond to adverse market, economic, political or other conditions, the Fund may invest 100% of its total assets, without limitation, for extended periods if desired, in high-quality short-term debt securities and money market instruments, depending on the Sub-Advisor's assessment of market conditions.

The Exchange represents that the Shares will be subject to NYSE Arca Equities Rule 8.600, which includes the initial and continued listing criteria applicable to Managed Fund Shares,<sup>6</sup> and will comply with Rule 10A-3 under the Act,<sup>7</sup> as provided by NYSE Arca Equities Rule 5.3. Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and

<sup>5</sup> The Fund may sell short only equity securities traded in the U.S. on registered exchanges. The Fund will not purchase or borrow illiquid securities or securities registered pursuant to Rule 144A under the Securities Act of 1933.

<sup>6</sup> The Exchange states that a minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange, and the Exchange will obtain a representation from the issuer of the Shares that the net asset value ("NAV") per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. See Notice, *supra* note 3.

<sup>7</sup> 17 CFR 240.10A-3.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

taxes is included in the Registration Statement and in the Notice.<sup>8</sup>

### III. 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 Act<sup>9</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>10</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the Exchange's rules 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 the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>12</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 for the Shares will be available via the Consolidated Tape Association high-speed line. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2)<sup>13</sup> that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>14</sup>

The Web site for the Fund (<http://www.advisorshares.com>) will contain the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

Portfolio Indicative Value ("PIV"), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The PIV will be based upon the current value for the components of the Disclosed Portfolio, and will be updated and disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session on the Exchange. Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers.

The Commission further 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 Exchange will obtain a representation from the issuer that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>15</sup> If the Exchange becomes aware that the NAV or the Disclosed Portfolio is not disseminated to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants.<sup>16</sup> In addition, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the PIV 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>17</sup>

will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

<sup>15</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

<sup>16</sup> See NYSE Arca Equities Rule 8.600(d)(2)(D).

<sup>17</sup> See *id.* Trading in the Shares may also 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, for

The Exchange represents that neither the Advisor nor the Sub-Advisor is affiliated with a broker-dealer. In the event the Advisor or the Sub-Advisor become affiliated with a broker-dealer, or any new adviser or sub-adviser becomes affiliated with a broker-dealer, they will be required to implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio.<sup>18</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.<sup>19</sup>

The Exchange has represented that the Shares are deemed to be equity securities subject to the Exchange's rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance 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.

(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 the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit Aggregations and that Shares are not individually redeemable; (b) 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 the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e)

example: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

<sup>18</sup> See also Commentary .06 to NYSE Arca Equities Rule 8.600.

<sup>19</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

<sup>8</sup> See Notice and Registration Statement, *supra* notes 3 and 4, respectively.

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</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>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>13</sup> "Disclosed Portfolio" is defined as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. The Disclosed Portfolio will disclose the following information: Ticker symbol (if applicable), name or description of security or investment, number of shares or dollar value of investments held in the portfolio, and percentage weighting of the security or investment in the portfolio.

<sup>14</sup> Under accounting procedures followed by the Fund, trades made on the prior business day ("T")

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 (f) trading information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Act.

(6) The Fund may sell short only equity securities traded in the U.S. on registered exchanges.

(7) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

This 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 Act<sup>20</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-NYSEArca-2010-107), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Elizabeth M. Murphy**,  
Secretary.

[FR Doc. 2011-1710 Filed 1-26-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63745; File No. SR-NASDAQ-2011-010]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Link Market Data Fees and Transaction Execution Fees

January 20, 2011.

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 January 10, 2011, The NASDAQ Stock Market LLC ("NASDAQ" 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.

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

NASDAQ proposes to reduce market data fees and transaction execution fees for retail investors. NASDAQ, like the Commission, "is particularly focused on the interests of long-term investors."<sup>3</sup> Retail investors' orders are often executed away from well-regulated public exchanges that offer pre-trade transparency. The Commission has noted that absent extraordinary conditions such as those occurring on May 6, 2010, retail orders are generally executed by internalizers away from exchanges and without pre-trade transparency, exposure or order interaction.<sup>4</sup> In NASDAQ's view, the likelihood that retail investors' orders are executed away from exchanges is impacted by disparities in regulation between lit markets such as those operated by exchanges<sup>5</sup> on one hand and broker systems or dark markets operated as Alternative Trading Systems on the other. One such disparity provides dark markets great flexibility to price differentiate between subscribers, while denying exchanges the same flexibility to differentiate between members. Furthermore, although exchanges and dark markets compete for the same order flow and for the same transactions, exchanges must file proposed fee schedules and changes, while other markets have no such burden. The result is that proposed rule changes that impact NASDAQ's ability to compete for order flow, transactions, and market data, such as the current proposal, are subject to significant scrutiny and potential delay while similar conduct by other markets is subject to no public filing requirement, no regulatory delay, and for dark markets is opaque to investors and competitors alike.

<sup>3</sup> See Exchange Act Release 61358, Concept Release on Equity Market Structure (Jan. 14, 2010), at p. 33.

<sup>4</sup> See Findings Regarding The Market Events Of May 6, 2010, Report Of The Staffs Of The CFTC And SEC To The Joint Advisory Committee On Emerging Regulatory Issues, September 30, 2010, at p. 56. It is often contended that dark markets serve the interests of large investors whose order sizes give rise to the potential for adverse market movements. Such potential does not exist in the case of smaller retail orders.

<sup>5</sup> Alternative Trading Systems that meet the five percent display threshold under Regulation ATS also qualify as lit markets with higher regulatory requirements. NASDAQ is not aware that any ATS is operating under these conditions today.

This filing is an attempt by NASDAQ to compete to attract retail investors' orders and to improve the experience of retail investors on NASDAQ's public market. NASDAQ is reducing fees for members that serve retail investors. Specifically, NASDAQ is reducing the costs of executing trades and of providing "depth of book" data products for NASDAQ member firms that service "non-professional" users with which the firm has a brokerage relationship. The more NASDAQ data a firm provides to retail investors, and the more that firm trades on NASDAQ, the lower its fees will be. This is an optional pricing proposal designed to benefit non-professional investors by providing an incentive for them to trade in the well-regulated, publicly-displayed market that NASDAQ operates.

NASDAQ will implement the proposed change on January 3, 2011. The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at NASDAQ'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, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below, and is set forth in Sections A, B, and C below. NASDAQ 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

This filing reduces prices for NASDAQ market data and for trading on NASDAQ. The proposed price reduction is targeted at retaining the business of members that represent retail investors and that redistribute market data to them in a non-professional capacity. NASDAQ believes that this proposal thereby promotes NASDAQ's and the Commission's goal of better serving long-term, retail investors and restoring confidence in public capital markets. The participation of these investors in NASDAQ's market benefits NASDAQ, its listed companies, its market quality, and the quality of its data products. The proposal is also a competitive response to other trading venues that have used

<sup>20</sup> 15 U.S.C. 78f(b)(5).

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</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.