

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64689; File No. SR-NYSEArca-2011-18]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade the Meidell Tactical Advantage ETF

June 16, 2011.

#### I. Introduction

On April 15, 2011, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") 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 Meidell Tactical Advantage ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published in the **Federal Register** on May 3, 2011.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600. 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 adviser to the Fund is AdvisorShares Investments, LLC ("Adviser"). American Wealth Management is the Fund's sub-adviser ("Sub-Adviser") and provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC ("Distributor") is the principal underwriter and distributor of the Fund's Shares. The Exchange states that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>5</sup>

#### Description of the Fund

The Fund's investment objective is to seek to provide long-term capital appreciation with a secondary emphasis on capital preservation. The Fund is an actively managed exchange-traded fund ("ETF") and, thus, does not seek to replicate the performance of a specified index. The Fund is considered a "fund-of-funds" that seeks to achieve its investment objective by primarily investing in other ETFs that offer diversified exposure to global regions, countries, styles (market capitalization, value, growth, etc.) or sectors, and other exchange-traded products ("ETPs," and, together with ETFs, "Underlying ETPs"),<sup>6</sup> including, but not limited to, exchange-traded notes ("ETNs"), exchange-traded currency trusts, and closed-end funds. The Fund will primarily invest in U.S.-listed domestic and foreign equity-based, fixed income-based, currency-based, and commodity-based Underlying ETPs.

The Sub-Adviser will seek to achieve the Fund's investment objective by managing a tactical strategy that has the ability to dynamically rebalance the Fund's portfolio from as much as 100% equity-based assets to 100% fixed income-based assets or cash and cash equivalents depending on market trends. This is a long-only tactical strategy that seeks to minimize portfolio losses by rotating out of higher volatility assets and into lower volatility assets when the Sub-Adviser believes there are significant risks in the equity markets. Risk management is an integral part of the Sub-Adviser's investment strategy. The Sub-Adviser will use a quantitative tactical methodology to identify the Underlying ETPs believed to be participating in long-term "durable trends" within the market. This model will enable the Sub-Adviser to evaluate, rank, and select the appropriate mix of investments in Underlying ETPs given market conditions.

dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

<sup>6</sup> Underlying ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600); and closed-end funds.

The Sub-Adviser's investment philosophy emphasizes investments in broad market indexes and market sector indexes. In general, the Fund will purchase or increase its exposure to Underlying ETPs that track equity markets or market sectors when the Sub-Adviser's quantitative tactical asset allocation model and risk analysis indicate that the applicable market or sector is at low risk of losing value or presents opportunity for growth and appreciation. The Fund will generally sell interests in, or reduce investment exposure to, Underlying ETPs tracking equity markets or market sectors in favor of fixed income-based Underlying ETPs or cash positions when the Sub-Adviser's quantitative tactical asset allocation model and risk analysis indicate that such markets have become, or are becoming, risky.

The Sub-Adviser will use a quantitative metric to rank and select the appropriate mix of investments given prevailing market conditions. The Sub-Adviser's quantitative tactical asset allocation model determines asset allocation between bonds and stocks, equity selection, sector concentration, as well as limiting portfolio drawdown. The general guidelines for the Fund's portfolio are as follows:

#### Assets Held by Underlying ETPs

|                         |         |
|-------------------------|---------|
| Equity-Based            | 0%–100% |
| Fixed Income-Based/Cash | 0%–100% |

Depending on the economic and market climate, the portfolio may increase or decrease portfolio concentrations within the ranges shown below.

|                  |        |
|------------------|--------|
| Foreign Equity   | 0%–50% |
| Large Cap Equity | 0%–50% |
| Mid Cap Equity   | 0%–30% |
| Small Cap Equity | 0%–30% |
| Commodities      | 0%–20% |
| Currencies       | 0%–10% |

The Fund's portfolio may temporarily exceed these percentage ranges for short periods without notice, and the Sub-Adviser may alter the percentage ranges when it deems appropriate.

Additional quantitative tools will be used to evaluate the probability of investment success within the equity market. These tools will allow the Sub-Adviser to get into or out of equity positions and will include, but are not limited to: (1) Interest rate spreads; (2) options activity; (3) market breadth; and (4) equity index trends.

The Fund intends to invest primarily in the securities of Underlying ETPs consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation, or order of the Commission or interpretation thereof. In addition, the Fund will only make such

<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. 64357 (April 28, 2011), 76 FR 24936 ("Notice").

<sup>4</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). On March 15, 2011, the Trust filed with the Commission Post-Effective Amendment No. 20 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) ("Registration Statement").

<sup>5</sup> See Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that, in the event (a) the Adviser or Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, such adviser and/or sub-adviser will implement a fire wall with respect to such broker-

investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986, as amended ("Code").

#### *Other Investments of the Fund*

The Fund may invest 100% of its total assets in high-quality debt securities and money market instruments either directly or through Underlying ETPs to respond to adverse market, economic, political, or other conditions.<sup>7</sup> The Fund may be invested in these instruments for extended periods, depending on the Sub-Adviser's assessment of market conditions. These debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities, repurchase and reverse repurchase agreements, and bonds that are BBB or higher.

The Fund will not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer, or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective American Depositary Receipts ("ADRs") or Global Depositary Receipts ("GDRs").<sup>8</sup>

The Fund may not invest 25% or more of its total assets in the securities

of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective ADRs or GDRs.

The Fund will seek to qualify for treatment as a Regulated Investment Company under the Code. In addition, the Fund will not: (1) Purchase illiquid securities; (2) except for Underlying ETPs that may hold non-U.S. issues, invest in non-U.S. issues; and (3) invest in leveraged, inverse, or inverse leveraged Underlying ETPs. Additional information regarding the Trust, the Fund, and the Shares, the Fund's investment strategies, risks, creation and redemption procedures, fees, portfolio holdings and disclosure policies, distributions and taxes, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice and the Registration Statement, as applicable.<sup>9</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>10</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>12</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>13</sup> which sets forth Congress's 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 and, for the Underlying ETPs, will be available from the national securities exchange(s) on which they are listed. In addition, the 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. On each business day, before commencement of trading in Shares during 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), that will form the basis for the Fund's calculation of the net asset value ("NAV") at the end of the business day.<sup>14</sup> The NAV of the Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange ("NYSE") (ordinarily 4 p.m. Eastern Time) on each business day. A basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation. 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, and information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Fund's Web site will also include a form of the prospectus for the Fund, information relating to NAV (updated daily), and

<sup>7</sup> Adverse market conditions would include large downturns in the broad market value of two or more times current average volatility, where the Sub-Adviser views such downturns as likely to continue for an extended period of time. Adverse economic conditions would include significant negative results in factors deemed critical at the time by the Sub-Adviser, including significant negative results regarding unemployment, Gross Domestic Product, consumer spending or housing numbers. Adverse political conditions would include events such as government overthrows or instability, where the Sub-Adviser expects that such events may potentially create a negative market or economic condition for an extended period of time. E-mail from Timothy J. Malinowski, Senior Director, NYSE Euronext, to Edward Y. Cho, Special Counsel, Division of Trading and Markets, Commission, dated June 8, 2011.

<sup>8</sup> ADRs, as well as GDRs, are certificates evidencing ownership of shares of a foreign issuer, and may be sponsored or unsponsored. These certificates are issued by depositary banks and generally trade on an established market in the United States or elsewhere. The underlying shares are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions.

<sup>9</sup> See Notice and Registration Statement, *supra* notes 3 and 4, respectively.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</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>12</sup> 17 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>14</sup> On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable); name of security or financial instrument; number of shares or dollar value of financial instruments held in the portfolio; and percentage weighting of the security or financial instrument in the portfolio.

other quantitative and trading information.

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 Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV 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> In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D) and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>16</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>17</sup> The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees, and neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>18</sup>

<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)(C)(ii). With respect to trading halts, the Exchange may consider other relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

<sup>17</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

<sup>18</sup> See *supra* note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing 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 Equity Trading Permit 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 Equity Trading Permit 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) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading and other information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Act,<sup>19</sup> as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund will not: (a) Purchase illiquid securities; (b) invest in non-U.S. issues (except for Underlying ETPs that may hold non-U.S. issues); and (c)

implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>19</sup> See 17 CFR 240.10A-3.

invest in leveraged, inverse, or inverse leveraged Underlying ETPs.

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

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 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-2011-18) be, and it hereby is, approved.

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

Cathy H. Ahn,  
Deputy Secretary.

[FR Doc. 2011-15554 Filed 6-21-11; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64691; File No. SR-NASDAQ-2011-079]

#### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Implementation Date for Several Rules in Connection With Trading System Enhancements

June 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on June 8, 2011, The NASDAQ Stock Market LLC ("Exchange" or "NASDAQ") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as 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.

<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.