SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69256; File No. SR-NYSEArca-2012-28)

March 28, 2013

Self-Regulatory Organizations; NYSE Arca, Inc.; Response to Comments Submitted After the Issuance on December 14, 2012, of a Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendment No. 1 to List and Trade Shares of the JPM XF Physical Copper Trust Pursuant to NYSE Arca Equities Rule 8.201

I. Introduction

On April 2, 2012, 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")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to list and trade shares ("Shares") of the JPM XF Physical Copper Trust ("Trust") pursuant to NYSE Arca Equities Rule 8.201. The proposed rule change was published for comment in the Federal Register on April 20, 2012.[3]

On December 14, 2012, the Commission approved the proposed rule change,[4] finding that it was consistent with the requirements of the Act. In its Approval Order, the Commission invited interested persons to submit written data, views, and arguments concerning the Approval

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Securities Exchange Act Release No. 66816 (April 16, 2012), 77 FR 23772 ("Notice").

4 See Securities Exchange Act Release No. 68440, 77 FR 75468 (December 20, 2012) ("Approval Order"). Prior to approving the proposed rule change, the Commission: (1) extended the time period for Commission action to July 19, 2012, see Securities Exchange Act Release No. 67075 (May 30, 2012), 77 FR 33258 (June 5, 2012); (2) instituted proceedings to determine whether to approve or disapprove the proposed rule change, see Securities Exchange Act Release No. 67470 (July 19, 2012), 77 FR 43620 (July 25, 2012); and (3) issued a notice of designation of longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change, see Securities Exchange Act Release No. 67965 (October 2, 2012), 77 FR 61457 (October 9, 2012).

Order, including whether Amendment No. 1 to the proposed rule change is consistent with the Act.[5]

In response to the solicitation of comments, the Commission received two comment letters.[6] Both letters opposed the approval of the proposed rule change, and one commenter specifically requested that the Commission reconsider and reverse its decision, and disapprove the proposed rule change.[7] This Response addresses those comments.

II. Response to Comments

One commenter (referred to herein as "the commenter") repeated many concerns that had been previously raised, considered by the Commission, and expressly addressed in the Approval

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5 See Approval Order, supra note 4, 77 FR at 75487.

6 See letter from Robert B. Bernstein, Partner, Eaton & Van Winkle LLP ("EVW"), to Elizabeth M. Murphy, Secretary, Commission, dated January 9, 2013 ("EVW January 9 Letter"); and e-mail from Janet Klein, dated January 7, 2013 ("Klein E-mail"). Comment letters are available at http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml. Ms. Klein asserted that approval of the proposed rule change would: (1) be "contrary to rational oversight of wise practice," without explaining the basis for her judgment; (2) not contribute to the economy; and (3) promote "speculative swings of a commodity price not related to supply/demand," again without explaining the basis for her conclusion. See Klein E-mail, supra. The Commission discussed the likelihood of any impact of the proposed rule change on the price of copper in the Approval Order. See Approval Order, supra note 4, 77 FR at 75477–82.

7 See EVW January 9 Letter, supra note 6. This commenter submitted seven comment letters opposing the proposed rule change prior to the Commission's issuance of the Approval Order. See letters from Vandenberg & Feliu, LLP ("V&F"), received May 9, 2012 ("V&F May 9 Letter"); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated July 13, 2012; Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated August 24, 2012 ("V&F August 24 Letter"); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated September 10, 2012 ("V&F September 10 Letter"); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated October 23, 2012; Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated November 16, 2012; and Robert B. Bernstein, EVW, to Elizabeth M. Murphy, Secretary, Commission, dated December 7, 2012 ("EVW December 7 Letter").

Order. This commenter, however, expanded upon and clarified some of his prior arguments.[8] Accordingly, the Commission responds below to certain comments made by the commenter after the Commission approved the proposed rule change.[9]

A. Direct Participation in Trading on the London Metal Exchange ("LME")

The commenter asserts that the Approval Order contained an incorrect statement of fact regarding who may trade directly on the LME. The commenter asserts that the Commission was incorrect in stating that "[o]nly eligible organizations or members are able to participate directly in trading on the LME," and asserts that only "open outcry" trading on the LME is limited to eligible organizations or members, and that most trading on the LME takes place in inter-office trading that is open to anyone who has a telephone and a computer screen.[10] The commenter further states that the Commission relied on this conclusion in reaching its decision.[11]

The Commission believes that the description in the Approval Order regarding trading on the LME is correct.[12] The Commission understands that trading on the LME can occur in a number of ways, all of which must occur through a member.[13] Trading can occur in the LME's

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8 See supra note 7.

9 The other comment is addressed supra at note 6.

10 See EVW January 9 Letter, supra note 6, at 4–5 (quoting Approval Order, supra note 4, 77 FR at 75469).

11 See EVW January 9 Letter, supra note 6, at 5.

12 The Approval Order expressly states that this description comes from the description of the copper market that the Exchange included in its filing. See Approval Order, supra note 4, 77 FR at 75469. In the notice of the proposed rule change, the Exchange stated: "The LME is a principal-to-principal market where only eligible organizations or 'members' are able to participate directly in trading." Notice, supra note 3, 77 FR at 23776. The commenter did not raise any concerns about the Exchange's description of the LME in any of the comment letters he previously submitted.

13 See Approval Order, supra note 4, 77 FR at 75469.

open-outcry trading floor (the "Ring"), but such trading is limited to ring-dealing members.[14] Electronic trading can occur through LMEselect; although clients can access LMEselect, such access is available only via member systems or member-sponsored Independent Software Vendor ("ISV") platforms.[15] Similarly, the LME's inter-office telephone market, which operates 24 hours a day, facilitates trading between LME members.[16] However, even assuming that direct trading on the LME were not limited to eligible organizations or members, such an assumption was not a basis for the Commission's findings.[17]

B. The Impact of Queues

In a comment submitted prior to issuance of the Approval Order, the commenter discussed the existing unloading queues for metals, including copper, at LME warehouses.[18] The commenter asserted that queues to unload copper from LME warehouses appear to be lengthening because owners of LME warehouses are "paying producers with surplus metal huge financial incentives to deposit their metal in LME warehouses, at which point such product may be sold, reportedly in some cases to owners of other LME warehouses, which is what is

14 See LME, Trading, Venues and Systems, The Ring, http://lme.com/trading/venues-and-systems/ring/.

15 See LME, Trading, Venues and Systems, Electronic, http://lme.com/trading/venues-and-systems/electronic/. In the case of member systems, client traffic must pass through a member order-routing bridge and/or a pre-trade risk engine fully controlled by the sponsoring member's compliance team. Client traffic can also pass through an ISV pre-trade risk engine endorsed and controlled by the sponsoring member's compliance team.

16 See LME, Trading, Venues and Systems, Telephone, http://lme.com/trading/venues-and-systems/telephone/.

17 See Approval Order, supra note 4, 77 FR at 75474–75 (discussing the availability of the Trust's copper); and id. at 75486–87 (discussing the Commission's findings).

18 See EVW December 7 Letter, supra note 7.

reportedly creating and perpetuating the ever-growing queue."[19] According to the commenter, the development of these queues "creates a scarcity of free units of metal that not only forces up premiums above LME cash prices in local geographic markets" but may ultimately prevent end-users of copper from obtaining access to needed copper in a timely fashion.[20]

In the Approval Order, the Commission addressed this comment. In concluding that the Trust's copper will remain available to consumers and other participants in the physical copper market, the Commission assumed, based on the record, that copper would be transferred to a redeeming authorized participant's book-entry account within three business days, and that a redeeming authorized participant taking delivery of copper from an LME warehouse would then have to wait in the queues just like other owners withdrawing metal from that warehouse.[21] The Commission stated its belief that waiting up to an extra three business days beyond the time required to take copper off of LME warrant is not a significant enough delay to consider the copper delivered from the Trust unavailable for immediate delivery, and noted that the commenter, who acknowledged that taking copper off of LME warrant takes time, considers copper on LME warrant to be available for immediate delivery.[22] In addition, the Commission pointed out that the Trust's copper may be held in both LME-approved warehouses and non-LME-approved warehouses, and there was nothing in the record concerning the existence of

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19 See id. at 2.

20 See id.

21 See Approval Order, supra note 4, 77 FR at 75474 n.83.

22 See id.

unloading queues in non-LME warehouses.[23] Further, the Commission stated that the LME appears to be attempting to address the problem of unloading queues.[24]

In the post-Approval Order comment letter, the commenter expands upon his prior comment about queues by asserting that "the placement of additional copper in LME warehouses may lead to substantially longer queues that will make it even more difficult for all consumer [sic] and other market participants to obtain physical copper that otherwise used to be available for immediate delivery."[25] The commenter also argues in his post-Approval Order letter that the longer queues that he predicts will occur, combined with the "huge costs of storage" that will be borne by anyone choosing to take physical delivery of copper, "may itself discourage the exercise of redemption rights."[26]

Several factors would impact how much copper will be deposited into each approved warehouse during the creation process, and how quickly. Authorized participants will determine where to deliver copper in exchange for Shares, choosing from among the eight permitted warehouse locations, which include LME and non-LME warehouses.[27] Authorized participants

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23 See id.

24 See id.

25 EVW January 9 Letter, supra note 6, at 13. According to the commenter, queue formation is a function of the demand to unload all metals stored in LME warehouses. See EVW December 7 Letter, supra note 7. Accordingly, even if Shares were created and redeemed in a manner that could exacerbate the existing queues, that activity could be offset entirely by fewer requests to take physical delivery of other metals stored in the warehouses.

26 See EVW January 9 Letter, supra note 6, at 13.

27 "The Trust will store its copper in both LME-approved warehouses and non-LME-approved warehouses . . . . Initially, the permitted warehouse locations will be in the Netherlands (Rotterdam), Singapore (Singapore), South Korea (Busan and Gwangyang), China (Shanghai), and the United States (Baltimore, Chicago, and New Orleans)." Approval Order, supra note 4, 77 FR at 75471.

may determine to deliver copper to non-LME warehouses in exchange for Shares. As noted in the Approval Order, there is nothing in the record concerning the existence of unloading queues in non-LME warehouses.[28] Further, it is unknown how many Shares would be created (i.e., how much copper would be deposited at permitted warehouse locations), and how quickly they would be created (i.e., how quickly the copper would be deposited at the permitted warehouse locations).[29] Thus, based on the record, the Commission cannot conclude that the placement of additional copper in LME warehouses due to the creation of Shares would lead to longer queues.

With respect to redemptions, it is unknown how often Share redemptions will occur and whether they will be followed by physical delivery.[30] Redeeming authorized participants (or their customers) will determine whether to retain the warehouse receipt or request physical delivery of copper. Some authorized participants who redeem Shares may choose to hold the warehouse receipt rather than withdraw the copper from the warehouse.[31] Thus, based on the

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[28] See id. at 75474 n.83.

[29] See id. at 75476–77. The commenter states that queues would be exacerbated only to the extent that additional copper is deposited into LME warehouses. See EVW January 9 Letter, supra note 6, at 13. In a prior comment letter, the commenter stated that authorized participants would likely create Shares by taking copper off warrant at an LME warehouse and using that copper to create Shares without ever removing it from the LME warehouse (referred to as “white lining”). See V&F September 10 Letter, supra note 7, at 2. Even assuming that the commenter is correct that authorized participants will elect to create Shares through white lining, then no additional copper would be added to an LME warehouse’s inventory. If the commenter is now asserting that copper will be delivered from another source, this supports the Commission’s belief that it is more plausible that copper that is not on LME warrant would be used to create Shares. See Approval Order, supra note 4, 77 FR at 75476.

[30] Additionally, when physical delivery is demanded after the redemption of Shares, for the reasons discussed above in the discussion of creations, it is unclear how often withdrawals would be from LME warehouses.

[31] As discussed in the Approval Order, copper received in exchange for redeemed Shares could be: (1) sold in the over-the-counter (“OTC”) market for cash; (2) swapped in the OTC market for copper in a different location or for a different brand; (3) placed on LME

record, the Commission cannot conclude that redemptions of Shares would lead to longer queues.

According to the commenter, anyone choosing to take physical delivery of copper following redemption will have to bear "huge storage costs."[32] The holders of Shares, however, also will pay storage costs indirectly through the Trust.[33] The commenter does not explain how storage costs, together with the longer queues that the commenter asserts would occur, would discourage redemption, because those who purchase Shares would have to pay storage costs, whether the Shares are redeemed or held.

For the reasons discussed above, and based on the record, the Commission cannot conclude that storage costs, together with "longer" queues that the commenter asserts would occur, would discourage the exercise of redemption rights.

C. Availability of Particular Copper Brands

In comments submitted prior to approval of the proposed rule change, the commenter expressed concern regarding the ability of end users to acquire copper of a preferred brand or in a preferred location.[34] The commenter asserted that end users would not acquire Shares and redeem them for physical copper because the copper they would receive in exchange for the

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warrant and traded on the LME; or (4) removed from the warehouse and consumed. See Approval Order, supra note 4, 77 FR at 75474. The commenter does not assert that the existence of queues would discourage authorized participants from redeeming Shares with the intent to sell or trade the copper, rather than take physical delivery.

[32] See EVW January 9 Letter, supra note 6, at 13.

[33] The Trust's expenses will include both the Sponsor's fee, including storage costs, and other expenses. Registration statement for the Trust, amended on July 12, 2011 (No. 333–170085), at 57 ("Registration Statement").

[34] See V&F September 10 Letter, supra note 7.

Shares might be in a location far from, or might be of brands that are not acceptable to, their plants.[35]

The Commission addressed these comments in the Approval Order, stating that, regardless of the preferences of these consumers, authorized participants may redeem Shares for copper and the record does not contain any evidence that these or any other consumers of copper could not use the Shares to obtain copper through an authorized participant.[36] Further, the Commission stated that the record supports that the same logistical issues exist and are regularly addressed by end-users of copper holding LME warrants,[37] and that nothing in the record indicates that copper merchants will not be able to perform the same function in connection with copper delivered in connection with Share redemptions.[38]

In the post-Approval Order letter, the commenter augments his prior argument by asserting that the purchase and sale of physical copper held by the Trust will not operate in the same way as the trading of copper on LME warrants because copper held by the Trust will not be for sale until after Shares are redeemed. The commenter further argues that the only "copper that can conceivably be traded by merchants for desired brands is copper on warrant in LME warehouses."[39] Accordingly, the commenter concludes that if, as he predicts, only copper on LME warrant is used to create Shares (and is thereby taken off warrant and unavailable for sale),

35 See Approval Order, supra note 4, at 75474 (citations omitted).

36 See id.

37 See id.

38 See id.

39 See EVW January 9 Letter, supra note 6, at 17.

"there is a much greater likelihood of there not being copper of the desired brands in the desired locations available for copper merchants to trade."[40]

In the Approval Order, the Commission stated that, while the sources of copper used to create Shares are uncertain,[41] it believes it is more plausible that a sufficient portion of the estimated 1.4 million metric tons of liquid copper inventories not on LME warrant would be available to authorized participants to use to create Shares.[42] Further, as mentioned above, authorized participants will choose the location of copper used to create Shares,[43] which makes it difficult to predict the location(s) from which the Trust's copper will come. Moreover, there is no data in the record concerning the availability of particular brands of copper, much less the availability of particular brands in particular locations.[44] The commenter does not provide in his post-Approval Order letter any new evidence to suggest that this scenario of brand scarcity in particular locations is likely to occur as a result of Share creation. Therefore, the Commission

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[40] See id.

[41] See Approval Order, supra note 4, 77 FR at 75475.

[42] See id. at 75475–76.

[43] This may be informed by the locational premia in the various authorized warehouse locations, but "premia in different locations have fluctuated historically relative to one another and will continue to change over time…" and "a region with the highest locational premia at a given time may have the lowest locational premia at a later date." Id. at 75475.

[44] The commenter, however, did provide projections that production will increase through 2016 in amounts that also exceed – and in most years greatly exceed – the amount of copper that the commenter predicts the Trust will hold. See V&F August 24 Letter, supra note 7, at 2 (providing data indicating that global refined copper is projected to increase by 519,000 metric tons in 2012; 1,603,000 metric tons in 2013; 1,195,000 metric tons in 2014; 1,091,000 metric tons in 2015, and 375,000 metric tons in 2016). While this data does not support the proposition that particular brands of copper will be more widely available at particular locations in the future, it also does not support the commenter's contention that particular brands of copper will be more scarce at particular locations in the future.

does not believe that the record supports the commenter's argument that, as a result of the Trust, it is much more likely that brand-sensitive end-users of copper will not be able to obtain their desired brands of copper at their desired locations.

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By the Commission.

Kevin M. O'Neill
Deputy Secretary