

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79402; File No. SR-NYSEArca-2016-131)

November 25, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Relating to Listing and Trading of Shares of the Virtus Enhanced U.S. Equity ETF under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3)

I. Introduction

On October 3, 2016, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Virtus Enhanced U.S. Equity ETF (“Fund”), a series of Virtus ETF Trust II (“Trust”), under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) (“Investment Company Units”). The proposed rule change was published for comment in the Federal Register on October 20, 2016.³ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Exchange’s Description of the Proposal⁴

The Exchange proposes to list and trade Shares of the Fund under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units on the Exchange. The Exchange represents that it has submitted the proposed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 79101 (October 14, 2016), 81 FR 72630 (“Notice”).

⁴ The Commission notes that additional information regarding the Fund, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice, and the Registration Statement, as applicable. See Notice, *supra* note 3, and Registration Statement, *infra* note 6.

rule change because the underlying index of the Fund does not meet all of the generic listing requirements of Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3), applicable to the listing of Investment Company Units based upon an index of “US Component Stocks.” Specifically, as discussed in the Notice,⁵ options on the S&P 500 index may be Index components. Consequently, the Index is not composed entirely of US Component Stocks, and therefore the Shares do not satisfy the requirements for generic listing under Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3).

The Fund will be an index-based exchange traded fund (“ETF”). The Shares will be offered by the Trust, which is registered with the Commission as an investment company and has filed a registration statement on Form N-1A (the “Registration Statement”) with the Commission on behalf of the Fund.⁶

The investment adviser to the Fund will be Virtus ETF Advisers LLC (“Adviser”). ETF Distributors LLC will serve as the distributor (“Distributor”) of Fund shares on an agency basis. The Bank of New York Mellon (“Administrator”) will be the administrator, custodian and transfer agent for the Fund.

A. The Fund’s Principal Investments

According to the Exchange, the Fund’s investment objective is to seek investment results that, before fees and expenses, closely correspond to the price and yield performance of the

⁵ See Notice, supra note 3, 81 FR at 72631.

⁶ The Exchange represents that, on September 1, 2016, the Trust filed a Registration Statement on Form N-1A under the Securities and Exchange Act of 1933 and the Investment Company Act of 1940 (“1940 Act”) (File Nos. 333-206600 and 811-23078). According to the Exchange, the Trust has obtained certain exemptive relief from the Commission under the 1940 Act. See Investment Company Act Release No. 30825 (December 11, 2013) (File No. 812-14212).

Rampart Enhanced U.S. Equity Index (“Index”).⁷ Under normal market conditions,⁸ the Fund will invest not less than 80% of its total assets in component securities of the Index.

Additionally, under normal market conditions, the Fund will invest not less than 80% of its total assets in U.S. exchange-traded common stocks. The Fund will also seek to generate additional income by writing SPX call options and will seek additional capital appreciation by purchasing SPX call options.

B. The Fund’s Non-Principal Investments

While the Fund, under normal market conditions will invest at least 80% of its net assets in the securities and financial instruments described above, the Fund may invest its remaining assets in the securities and financial instruments described below.

The Fund may invest in short-term, high quality securities issued or guaranteed by the U.S. government (in addition to U.S. Treasury securities) and non-U.S. governments, and each of their agencies and instrumentalities; debt securities issued by U.S. government sponsored enterprises; repurchase agreements backed by U.S. government and non-U.S. government securities; money market mutual funds; and deposit and other obligations of U.S. and non-U.S. banks and financial institutions (“Money Market Instruments”).

⁷ According to the Exchange, the Index was developed by Rampart Investment Management Company, LLC (“Index Provider”), and is calculated and maintained by NYSE Global Index Group (“Index Calculation Agent”). The Index Provider is affiliated with the Adviser and the Distributor. The Index Calculation Agent is not affiliated with the Adviser, Distributor, Administrator, or the Trust.

⁸ The term “normal market conditions” is defined in NYSE Arca Equities Rule 8.600 (c)(5). On a temporary basis, including for defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objectives. The Fund may adopt a defensive strategy when the Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

The Fund may invest in ETFs.⁹

The Fund may invest in U.S. exchange-traded equity index futures contracts.

The Fund may invest in U.S. exchange-traded index options (other than SPX) and U.S. exchange-traded options on ETFs.

The Fund may invest in U.S. exchange-traded options on futures contracts and U.S. exchange-traded options on stocks.

C. Investment Restrictions

The Exchange represents that the Fund will not invest in any non-U.S. equity securities. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

The Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.¹⁰

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act¹¹ and the rules and regulations thereunder applicable to a national securities exchange.¹² In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹³ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

⁹ The Fund will not invest in leveraged ETFs, (e.g., 2X or 3X) or inverse or inverse leveraged ETFs (e.g., -1X or -2X).

¹⁰ 26 U.S.C. 851.

¹¹ 15 U.S.C. 78f.

¹² 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).

¹³ 17 U.S.C. 78f(b)(5).

principles of trade, to foster cooperation and 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 also 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,¹⁴ 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 ("CTA"). The current value of the Index will be widely disseminated by one or more major market data vendors as required by NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(b)(iii). In addition, during the Core Trading Session (9:30 a.m. to 4:00 p.m. Eastern Time), an IIV for the Shares will be disseminated by one or more major market data vendors and updated at least every 15 seconds.¹⁵ Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic devices. The website for the Fund will include the prospectus for the Fund and additional data relating to the net asset value ("NAV") and other applicable quantitative information. Information regarding each portfolio holding will be disclosed by the Trust on each business day before commencement of trading in Shares in the Core Trading Session on the Exchange.

¹⁴ 15 U.S.C. 78k-1(a)(1)(C)(iii).

¹⁵ The Exchange states that it understands that several major market data vendors display and/or make widely available IIV's taken from the CTA or other data feeds. See Notice, supra note 3, 81 FR at 72634, n.20.

The Commission 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 may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. Shares of the Fund will be halted if the “circuit breaker” parameters in NYSE Arca Equities Rule 7.12 are reached. Trading may 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: (1) the extent to which trading is not occurring in the securities 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.

If the IIV, Index value or the value of the Index components is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.¹⁶ The Exchange will obtain a representation from the Fund that the NAV for the Fund will be calculated daily and will be made available to all market participants at the same time.¹⁷ Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Fund is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

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

- (1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2), except that the Index will not meet the

¹⁶ See id. at 72634.

¹⁷ See id.

requirements of NYSE Arca Equities Rule 5.2(j)(3), Commentary .01(a)(A)(1–5) in that the Index will include options.

- (2) The Exchange represents that trading in the Shares will be subject to the existing Exchange trading surveillances procedures, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange.¹⁸ The Exchange represents that these 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 federal securities laws applicable to trading on the Exchange.¹⁹
- (3) The Exchange or FINRA, on behalf of the Exchange will communicate as needed regarding trading in the Shares, ETFs, options, and futures with markets and other entities that are members of the Intermarket Surveillance Group (“ISG”), and the Exchange or FINRA, on behalf of the Exchange may obtain trading information regarding trading in the Shares, ETFs, options, and futures from those markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.²⁰ The Exchange is able to access from FINRA, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s Trade Reporting and Compliance Engine.²¹

¹⁸ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

¹⁹ See id.

²⁰ For a list of the current members of ISG, see www.isgportal.org.

²¹ See id.

- (4) For initial and continued listing of the Shares, the Trust is required to comply with Rule 10A-3 under the Act.²²
- (5) Prior to the commencement of trading of Shares in the Fund, the Exchange will inform its ETP Holders in an Information Bulletin (“Bulletin”) of the special characteristics and risks associated with trading the Shares. Specifically, the 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 IIV or Index value will not be calculated or publicly disseminated; (d) how information regarding the IIV and Index value will be disseminated; (e) 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.
- (6) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.²³
- (7) The Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and

²² See 17 CFR 240.10A-3.

²³ See Notice, supra note 3, 81 FR at 76234.

surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.²⁴

- (8) The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).²⁵

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice.

For the foregoing reasons, the Commission finds that the proposed rule change, is consistent with Section 6(b)(5) of the Act²⁶ and the rules and regulations thereunder applicable to a national securities exchange.

²⁴ See id. at 72635.

²⁵ See id.

²⁶ 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷ that the proposed rule change (SR-NYSEArca-2016-131), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Brent J. Fields
Secretary

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).