

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71378; File No. SR-NYSEArca-2013-137)

January 23, 2014

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to List and Trade Shares of the Merk Gold Trust Pursuant to NYSE Arca Equities Rule 8.201

I. Introduction

On November 27, 2013, 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 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of Merk Gold Trust (“Trust”) pursuant to NYSE Arca Equities Rule 8.201. On December 11, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the Federal Register on December 17, 2013.<sup>4</sup> The Commission received no comment letters regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.201, which governs the listing and trading of Commodity-Based Trust Shares.<sup>5</sup> Each Share

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> In Amendment No. 1, the Exchange clarified certain statements in the filing with respect to: (1) the Custodian’s (as defined below) information barriers between itself and its broker-dealer affiliate; (2) the use of unallocated gold accounts by other gold trusts; and (3) the Trustee’s role in valuing the Trust’s physical gold holdings.

<sup>4</sup> See Securities Exchange Act Release No. 71038 (December 11, 2013), 78 FR 76367 (December 17, 2013) (“Notice”).

<sup>5</sup> Commodity-Based Trust Shares are securities issued by a trust that represent investors’

will represent a fractional undivided beneficial interest in the Trust's net assets.<sup>6</sup> The Exchange represents that the Shares satisfy the requirements of NYSE Arca Equities Rule 8.201 and thereby qualify for listing on the Exchange.<sup>7</sup> The Exchange deems the Shares to be equity securities and therefore subject to the Exchange's rules governing the trading of equity securities.<sup>8</sup>

The sponsor of the Trust is Merk Investments LLC ("Sponsor").<sup>9</sup> The trustee for the Trust is The Bank of New York Mellon ("Trustee").<sup>10</sup> The custodian is JPMorgan Chase Bank, N.A. (the "Custodian").<sup>11</sup>

The Exchange states that the objective of the Trust is to provide investors with an opportunity to invest in gold and be able to take delivery of physical gold in exchange for their

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discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the trust.

<sup>6</sup> See Notice, supra note 4, at 76368.

<sup>7</sup> See Notice, supra note 4, at 76368.

<sup>8</sup> See Notice, supra note 4, at 76373.

<sup>9</sup> The Sponsor is a Delaware limited liability company. The Sponsor generally oversees the performance of the Trustee and the Trust's principal service providers, but does not exercise day-to-day oversight of the Trustee or such service providers. See Notice, supra note 4, at 76367. Additional details regarding the Trust are set forth in the Registration Statement for the Trust on Form S-1, filed with the Commission on April 8, 2013 (No. 333-180868) (as amended, the "Registration Statement").

<sup>10</sup> The Trustee will be responsible for the day-to-day administration of the Trust and is responsible, among other things, for valuing the Trust's holdings and calculating net asset value ("NAV") per Share of the Trust. See Notice, supra note 4, at 76367.

<sup>11</sup> The Custodian is affiliated with a broker-dealer. The Custodian has represented that it has policies and procedures in place to enable it to comply with its regulatory obligations in relation to appropriate information barriers and controls to safeguard client confidentiality, including, but not limited to, information barriers and controls between itself and its broker-dealer affiliate so that its broker-dealer affiliate will not have access to information concerning the composition of and/or changes to the Trust's holdings that are not available on the Trust's website. See Notice, supra note 4, at 76367-68.

Shares; the Trust's secondary objective is for the Shares to reflect the performance of the price of gold less the expenses of the Trust's operations.<sup>12</sup> According to the Exchange, the Trust is not actively managed and does not engage in any activities designed to obtain a profit from, or to compensate investors for losses caused by, changes in the price of gold.

Shareholders may redeem their Shares by submitting to the Sponsor a delivery application and payment for the applicable: (1) processing fees; and (2) delivery fees to cover the cost of preparing and transporting physical gold to the shareholder.<sup>13</sup> The number of shares to be redeemed must: (1) correspond to at least one Fine Ounce<sup>14</sup> of physical gold; and (2) have a minimum dollar value in an amount that is specified by the Sponsor from time to time on the Trust's website.<sup>15</sup> If the Sponsor approves the delivery application,<sup>16</sup> the shareholder would submit his/her Shares to the Trustee and receive physical gold and, if applicable, cash in return.<sup>17</sup>

Additional information regarding the Trust, including NAV calculation, operation of the Trust, restrictions, risks, expenses, and creation and redemption of Shares can be found in the Notice and/or Registration Statement.

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder

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<sup>12</sup> See Notice, supra note 4, 78 FR at 76368. The Trust is neither an investment company registered under the Investment Company Act of 1940 nor a commodity pool for purposes of the Commodity Exchange Act. See Notice, supra note 4, at 76368.

<sup>13</sup> See Notice, supra note 4, at 76370.

<sup>14</sup> Fine Ounce is defined in the Registration Statement as an ounce of 100% pure gold.

<sup>15</sup> See Notice, supra note 4, at 76371.

<sup>16</sup> See Notice, supra note 4, at 76370-71 (explaining the process the Sponsor will follow to review and approve delivery applications).

<sup>17</sup> See Notice, supra note 4, at 76371.

applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>19</sup> 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 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 Exchange states it is able, pursuant NYSE Arca Equities Rule 8.201(g), to obtain information regarding trading in the Shares and the underlying gold, gold futures contracts, options on gold futures, or any other gold derivative through Equity Trading Permit Holders (“ETP Holders”) acting as registered Market Makers, in connection with their proprietary or customer trades. More generally, the Exchange states that it has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. With respect to a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange states that it could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member. The Exchange also states that it may obtain trading information via the Intermarket Surveillance Group (“ISG”) from other exchanges that are members of the ISG, including the COMEX.<sup>20</sup> Commentary .04 of NYSE Arca Equities Rule 6.3 requires an ETP Holder acting as a registered Market Maker in the Shares, and its affiliates, to establish, maintain, and enforce written policies and procedures

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<sup>18</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>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See Notice, supra note 4, at 76374.

reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).<sup>21</sup> NYSE Arca Equities Rule 8.201(g) and Commentary .04 of NYSE Arca Equities Rule 6.3 may help to prevent fraudulent and manipulative acts and practices by facilitating the Exchange's surveillance of trading in the Shares.

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 Exchange Act,<sup>22</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. Last sale, quotation information, trading volume, closing prices and NAV for the Shares from the previous day will be available via the Consolidated Tape.<sup>23</sup> The Trust's website will include, on a per Share basis, for the Trust: (1) the midpoint of the bid-ask price at the close of trading in relation to NAV as of the time the NAV is calculated ("Bid/Ask Price"), and a calculation of the premium or discount of such price against such NAV; (2) data displaying the frequency of distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters; and (3) the Trust's prospectus, as well as the two most recent reports to stockholders.<sup>24</sup> The Trust's website also will provide the last sale

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<sup>21</sup> See Notice, supra note 4, at 76373-74.

<sup>22</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>23</sup> See Notice, supra note 4, at 76373, 76374.

<sup>24</sup> See Notice, supra note 4, at 76372.

price of the Shares as traded in the U.S. market.<sup>25</sup>

The Commission believes that the proposal to list and trade the Shares is reasonably designed to promote disclosure of information that may be necessary to price Shares appropriately and to help prevent trading when a reasonable degree of transparency cannot be assured. The Trust's website will provide daily a breakdown of the holdings of the Trust by the form in which gold is held.<sup>26</sup> The value of the Trust's holdings also will be reported on the Trust's website daily.<sup>27</sup> Prior to the commencement of trading in the Shares on the Exchange, the Exchange will obtain a representation from the Sponsor that the NAV will be calculated daily and will be made available to all market participants at the same time.<sup>28</sup> Moreover, there is a considerable amount of gold price and gold market information available on public websites and through professional and subscription services.<sup>29</sup> For example, Reuters and Bloomberg provide at no charge on their websites delayed information regarding the spot price of gold and last sale prices of gold futures, as well as information about news and developments in the gold market.<sup>30</sup> Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on gold prices directly from market participants.<sup>31</sup>

The Exchange will consider suspending trading in the Shares pursuant to NYSE Arca

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<sup>25</sup> See Notice, supra note 4, at 76372.

<sup>26</sup> See Notice, supra note 4, at 76372.

<sup>27</sup> See Notice, supra note 4, at 76372.

<sup>28</sup> See Notice, supra note 4, at 76372. Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it must halt trading on the NYSE Marketplace until such time as the NAV is available to all market participants.

<sup>29</sup> See Notice, supra note 4, at 76373.

<sup>30</sup> See Notice, supra note 4, at 76373.

<sup>31</sup> See Notice, supra note 4, at 76373.

Rule 8.201(e)(2) if, after the initial 12-month period following commencement of trading: (1) the value of gold is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the Sponsor, Trust, Custodian, or the Exchange, or the Exchange stops providing a hyperlink on its website to the value of gold; or (2) if the intraday trust value (“IIV”) is no longer made available on at least a 15-second delayed basis.<sup>32</sup> If the IIV 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.<sup>33</sup> The Exchange will halt trading in the Shares if the NAV of the Trust is not calculated or disseminated daily.<sup>34</sup>

In support of its proposal, the Exchange has made representations, including:

- (1) The Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.201.<sup>35</sup>
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.<sup>36</sup>
- (3) The Exchange’s existing surveillance procedures applicable to derivative products

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<sup>32</sup> See NYSE Arca Equities Rules 8.201(e)(2)(iv) and (v). More generally, NYSE Arca may halt trading in the Shares on the Exchange because of market conditions or for reasons that, in the Exchange’s view, make trading in the Shares inadvisable, including: (1) the extent to which conditions in the underlying gold market have caused disruptions and/or lack of trading; and (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. See Notice, supra note 4, at 76373. Additionally, trading in the Shares will be subject to trading halts caused by extraordinary market volatility pursuant to NYSE Arca’s “circuit breaker” rule. See Notice, supra note 4, at 76373; NYSE Arca Equities Rule 7.12.

<sup>33</sup> See Notice, supra note 4, at 76373.

<sup>34</sup> See Notice, supra note 4, at 76373.

<sup>35</sup> See Notice, supra note 4, at 76374.

<sup>36</sup> See Notice, supra note 4, at 76373.

(including Commodity-Based Trust Shares) 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.<sup>37</sup>

- (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: (1) the procedures for purchases and redemptions of Shares; (2) 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; (3) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (4) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of gold trading during the Core and Late Trading Sessions after the close of the major world gold markets; and (5) trading information.<sup>38</sup>
- (5) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.<sup>39</sup>

This approval order is based on all of the Exchange's representations and description of the Trust, including those set forth above and in the Notice, as modified by Amendment No. 1.

For the foregoing reasons, the Commission believes the proposal to list and trade the Shares is consistent with the Exchange Act.

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<sup>37</sup> See Notice, supra note 4, at 76373.

<sup>38</sup> See Notice, supra note 4, at 76374.

<sup>39</sup> See Notice, supra note 4, at 76373.



IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,<sup>40</sup> that the proposed rule change (SR-NYSEArca-2013-137), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

Elizabeth M. Murphy  
Secretary

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<sup>40</sup> 15 U.S.C. 78s(b)(2).

<sup>41</sup> 17 CFR 200.30-3(a)(12).