

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54490; File No. SR-NYSEArca-2006-61)

September 22, 2006

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend Existing Rules for Investment Company Units

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 19, 2006, NYSE Arca, Inc. (the “Exchange”), through its wholly-owned subsidiary NYSE Arca Equities, Inc. (“NYSE Arca Equities”), 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 and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through NYSE Arca Equities, proposes to amend Commentary .01(b)(1) to NYSE Arca Equities Rule 5.2(j)(3). The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.

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(b) Index Methodology and Calculation.

(1) The index underlying a series of Units will be calculated based on [either] the market capitalization, modified market capitalization, price, equal-dollar or modified

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

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

equal-dollar weighting or a methodology weighting components of the index based on any, some or all of the following: sales, cash flow, book value and dividends;

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has adopted listing standards applicable to Investment Company Units (“Investment Company Units” or “ICUs”) that are consistent with the listing criteria currently used by other national securities exchanges, and trading standards pursuant to which the Exchange may either list and trade ICUs or trade such ICUs on the Exchange on an unlisted trading privileges (“UTP”) basis.<sup>3</sup> An Investment Company Unit is defined in NYSE Arca Equities Rule 5.1(b)(15) as a security representing an

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<sup>3</sup> In October 1999, the Commission approved NYSE Arca Equities Rule 5.2(j)(3), which sets forth the rules related to listing and trading criteria for Investment Company Units. Securities Exchange Act Release No. 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999)(SR-PCX-1998-29). In July 2001, the Commission also approved the Exchange’s listing standards pursuant to Rule 19b-4(e) for listing and trading, or the trading pursuant to UTP, of Investment Company Units under NYSE Arca Equities Rule 5.2(j)(3). Securities Exchange Act Release No. 44551 (July 12, 2001), 66 FR 37716-01 (July 19, 2001)(SR-PCX-2001-14).

interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company or a similar entity. A registered investment company is registered under the Investment Company Act of 1940.<sup>4</sup>

The “generic” listing criteria of Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) permits listing or trading pursuant to UTP of ICUs that satisfy such criteria in reliance upon Rule 19b-4(e) under the Act<sup>5</sup>, without a filing pursuant to Rule 19b-4 under the Act.<sup>6</sup> Commentary .01(b)(1) to NYSE Arca Equities Rule 5.2(j)(3) requires that if a series of ICUs approved for trading (including pursuant to UTP) on the Exchange in reliance upon Rule 19b-4(e) under the Act,<sup>7</sup> the index underlying the series of ICUs must be calculated based on either the market capitalization, modified market capitalization, price, equal-dollar or modified equal-dollar weighting methodology.

According to the Exchange, the proposed rule change will specify one additional methodology. The Exchange proposes to amend Commentary .01(b)(1) to NYSE Arca Equities Rule 5.2(j)(3) to permit a series of ICUs to be listed or traded pursuant to UTP under the generic standards pursuant to Rule 19b-4(e) under the Act<sup>8</sup> if the underlying index for such series is weighted based on any, some or all of the following: sales, cash flow, book value, and dividends (“fundamentals weighted indexes”).<sup>9</sup> The Exchange

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<sup>4</sup> 15 U.S.C. 80a.

<sup>5</sup> 17 CFR 240.19b-4(e).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</sup> 17 CFR 240.19b-4(e).

<sup>8</sup> Id.

<sup>9</sup> In each instance, the index methodology will set forth the means for calculating sales, cash flow, book value, and dividends.

states that the proposed rule change is based on the proposed rule change of the NASDAQ Stock Market LLC (“Nasdaq”).<sup>10</sup>

“Sales” refers to the total of reported operating revenues less various adjustments to gross sales, such as returns, discounts, allowances, excise taxes, insurance charges, sales taxes, and value added taxes. In calculating the sales value, an index provider may opt to average the company's applicable figures for several prior years (e.g., five prior years as reflected in the company's Annual Report on Form 10-K).

“Cash Flow” refers to operating income plus depreciation. For example, a manufacturer typically reports its operating income as its net sales plus other operating income minus the cost of goods sold and selling, general and administrative expenses. Depreciation expense for a manufacturer typically includes the depreciation that is directly related to or associated with tangible fixed assets and includes amortization of fixed assets that are part of plant, property and equipment, such as leased assets, leasehold improvements, and internal use software. For example, for a manufacturer depreciation, expense excludes amortization of intangible assets. For banks, financial companies and REITs, operating income refers to their total operating revenue minus total operating expenses. For REITs, depreciation expense includes depreciation relating to real estate property and includes: corporate fixed asset depreciation if not separated from property depreciation. In calculating cash flow, an index provider may opt to average the company's applicable figures for several prior years (e.g., five prior years as reflected in the company's Annual Report on Form 10-K).

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<sup>10</sup> See Securities Exchange Act Release No. 54459 (September 15, 2006), 71 FR 55533 (September 22, 2006)(SR-NASDAQ-2006-035).

“Book Value” refers to a company's book value at the index review date. In accordance with accounting principles, book value generally means total common equity, which is derived from adding share capital and additional paid-in capital to retained earnings. In calculating book value, an index provider may opt to average the company's applicable figures for several prior years (e.g., five prior years as reflected in the company's Annual Report on Form 10-K).

“Dividends” refers to total dividend distributions, including both special and regular dividends paid in cash. Generally, the total dividend amount that is declared to all classes of common shareholders includes regular cash, as well as special cash dividends, and excludes returns of capital and in-specie dividends. In calculating dividends, an index provider may opt to average the company's applicable figures for several prior years (e.g., five prior years as reflected in the company's Annual Report on Form 10-K).

The Exchange believes that the fundamentals weighting methodology is a transparent methodology that is appropriately included in the ICU generic listing criteria as an alternative to traditional weighting techniques. According to the Exchange, fundamental indexing provides an investor with additional choices in selecting exchange-traded funds whose underlying index emphasizes financial factors that the investor may believe are important. The Exchange notes that products based on indexes using this methodology are already subject to the other requirements of the generic listing standards pursuant to Rule 19b-4(e).<sup>11</sup> The Exchange has requested accelerated approval in order

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<sup>11</sup> 17 CFR 240.19b-4(e).

to avoid delay in the listing and trading (including pursuant to UTP) of securities linked to fundamental weighted indexes.<sup>12</sup>

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>13</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5)<sup>14</sup> of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the proposed rule change should facilitate the listing and trading (including pursuant to UTP) of Investment Company Units that rely on an index using a fundamental weighting methodology and should thereby reduce the burdens on issuers and other market participants.<sup>15</sup>

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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<sup>12</sup> Telephone conference on September 21, 2006 between Michael Cavalier, Assistant General Counsel, NYSE Group, Inc. and Mitra Mehr, Special Counsel, Division of Market Regulation, Commission (“September 21<sup>st</sup> Telephone Conference”).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> September 21<sup>st</sup> Telephone Conference.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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 No. SR-NYSEArca-2006-61 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2006-61. 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 inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. 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 Number SR-NYSEArca-2006-61 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

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<sup>16</sup> In approving this 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>17</sup> 15 U.S.C. 78f(b)(5).

The proposed rule change amends NYSE’s existing generic listing standards pursuant to Rule 19b-4(e)<sup>18</sup> for Investment Company Units to provide that an eligible index may be calculated following the “fundamentals weighted” or “fundamental index” methodology. This index calculation methodology weights components based on one or more of the following: sales, cash flow, book value, and dividends.<sup>19</sup>

Including this index calculation methodology in NYSE’s generic listing standards will provide investors with more investment choices by offering an alternative to the other index methodologies, such as capitalization-weighted ones. The Commission notes that the indexes that would be based on the fundamentals weighting methodology will already be subject to the requirements of the generic listing standards pursuant to Rule 19b-4(e) of the Act,<sup>20</sup> including trading volume and liquidity requirements. In addition, by amending its generic listing standards pursuant to Rule 19b-4(e) of the Act,<sup>21</sup> NYSE should reduce the time frame for listing and trading Investment Company Units that rely on an index utilizing a fundamentals weighting methodology. The proposed rule change should therefore facilitate the listing and trading (including on an unlisted trading privileges basis) of such securities and thereby reduce the burdens on issuers and other market participants.

The Exchange has requested accelerated approval of the proposed rule change.

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<sup>18</sup> 17 CFR 240.19b-4(e).

<sup>19</sup> According to the NYSE, in each instance, the index methodology will set forth the means of calculating sales, cash flow, book value, and dividends and thus will be transparent.

<sup>20</sup> 17 CFR 240.19b-4(e).

<sup>21</sup> Id.

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing in the Federal Register. The Commission believes the proposed rule change should provide investors with an alternative to the current index calculation methodologies. The proposed rule change is substantially identical to that approved for another exchange.<sup>22</sup> The Commission does not believe

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<sup>22</sup> See Securities Exchange Act Release No. 54459 (September 15, 2006), 71 FR 55533 (September 22, 2006)(SR-NASDAQ-2006-035).

that the proposed rule change raises any novel regulatory issues. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>23</sup> to approve the proposed rule change on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> that the proposed rule change (SR-NYSEArca-2006-61) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

Nancy M. Morris  
Secretary

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<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> Id.

<sup>25</sup> 17 CFR 200.30-3(a)(12).