

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57751; File No. SR-NYSEArca-2008-29)

May 1, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the Eligibility Criteria for Components of an Index Underlying Investment Company Units

I. Introduction

On March 13, 2008, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), 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 proposal to amend Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) to modify the eligibility criteria for components of an index underlying Investment Company Units (“Units”).<sup>3</sup> On March 24, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the Federal Register on April 1, 2008.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) provides that NYSE Arca Equities may approve a series of Units for listing and trading (including trading pursuant to

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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> Units are securities that represent an 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, that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities or securities in another registered investment company that holds securities. See NYSE Arca Equities 5.2(j)(3).

<sup>4</sup> See Securities Exchange Act Release No. 57561 (March 26, 2008), 73 FR 17390.

unlisted trading privileges) pursuant to Rule 19b-4(e) under the Act,<sup>5</sup> if such series satisfies the criteria set forth in Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3). The Exchange proposes to exclude Units and certain other securities defined in Section 2 of NYSE Arca Equities Rule 8 (collectively, “Derivative Securities Products”)<sup>6</sup> when applying the quantitative listing requirements of Commentaries .01(a)(A) and (B) to NYSE Arca Equities Rule 5.2(j)(3) relating to the listing of Units based on a U.S. index or portfolio or an international or global index or portfolio, respectively.

With respect to Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3), the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least \$75 million (Commentary .01(a)(A)(1)); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .01(a)(A)(2)); and (3) the most heavily weighted component stock must not

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<sup>5</sup> Rule 19b-4(e) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (“SRO”) shall not be deemed a proposed rule change, pursuant to Rule 19b-4(c)(1) under the Act (17 CFR 240.19b-4(c)(1)), if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO’s trading rules, procedures, and listing standards for the product class that would include the new derivatives securities product, and the SRO has a surveillance program for the product class. See 17 CFR 240.19b-4(e).

<sup>6</sup> The following securities are included in Section 2 of NYSE Arca Equities Rule 8: Portfolio Depositary Receipts (Rule 8.100); Trust Issued Receipts (Rule 8.200); Commodity-Based Trust Shares (Rule 8.201); Currency Trust Shares (Rule 8.202); Commodity Index Trust Shares (Rule 8.203); Partnership Units (Rule 8.300); Paired Trust Shares (Rule 8.400); and Managed Fund Shares (Rule 8.600). See Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving, among other things, the adoption of listing standards for Managed Fund Shares).

exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 65% of the weight of the index or portfolio (Commentary .01(a)(A)(3)). Component stocks, in the aggregate, excluding Derivative Securities Products, would still be required to meet the criteria of these provisions. Thus, for example, when determining compliance with Commentaries .01(a)(A)(1) and (2) to NYSE Arca Equities Rule 5.2(j)(3), component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least \$75 million and minimum monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .01(a)(A)(3) to NYSE Arca Equities Rule 5.2(j)(3), when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Product included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirement in Commentary .01(a)(A)(4) to NYSE Arca Equities Rule 5.2(j)(3), which requires that the underlying index or portfolio include a minimum of 13 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) one or more series of Units or Portfolio Depositary Receipts (as defined in NYSE Arca Equities Rule 8.100) constitute, at least in part, components underlying a series of Units; or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of Units includes one or more series of Units or Portfolio Depositary Receipts, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (i.e., one or

more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products, other than Units or Portfolio Depositary Receipts, and other securities that are not Derivative Securities Products (e.g., common stocks), then there would have to be at least 13 components in the underlying index or portfolio.

Consistent with current Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3), all securities in the index or portfolio (including Derivative Securities Products) must nevertheless be U.S. Component Stocks<sup>7</sup> that are listed on a national securities exchange and NMS Stocks, as defined in Rule 600 under the Act.<sup>8</sup>

With respect to Commentary .01(a)(B) to NYSE Arca Equities Rule 5.2(j)(3), the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least \$100 million (Commentary .01(a)(B)(1)); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .01(a)(B)(2)); and (3) the most heavily weighted component stock must not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 60% of the weight of the index or portfolio (Commentary

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<sup>7</sup> “U.S. Component Stock” means an equity security that is registered under Section 12(b) or Section 12(g) of the Act or an American Depositary Receipt, the underlying equity security of which is registered under Section 12(b) or Section 12(g) of the Act. See NYSE Arca Equities Rule 5.2(j)(3).

<sup>8</sup> See 17 CFR 242.600(b)(47).

.01(a)(B)(3)). Thus, for example, when determining compliance with Commentaries .01(a)(B)(1) and (2) to NYSE Arca Equities Rule 5.2(j)(3), component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least \$100 million and minimum worldwide monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3), when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Product included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirement in Commentary .01(a)(B)(4) to NYSE Arca Equities 5.2(j)(3), which requires that the underlying index or portfolio include a minimum of 20 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) one or more series of Units or Portfolio Depositary Receipts (as defined in NYSE Arca Equities Rule 8.100) constitute, at least in part, components underlying a series of Units, or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of Units includes one or more series of Units or Portfolio Depositary Receipts, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (i.e., one or more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products, other than Units or Portfolio Depositary Receipts, and other securities that are not Derivative Securities Products (e.g.,

common stocks), then there would have to be at least 20 components in the underlying index or portfolio.

Consistent with current Commentary .01(a)(B)(5) to NYSE Arca Equities Rule 5.2(j)(3), each component that is a U.S. Component Stock (including Derivative Securities Products) would be required to be listed on a national securities exchange and be an NMS Stock, as defined in Rule 600 under the Act,<sup>9</sup> and each component that is a Non-U.S. Component Stock<sup>10</sup> (including Derivative Securities Products) would be required to be listed and traded on an exchange that has last-sale reporting.

### III. Commission’s Findings and Order Granting Approval of the Proposed Rule Change

After careful review and based on the Exchange’s representations, 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>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>12</sup> in that it is designed to promote just and equitable 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

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<sup>9</sup> See id.

<sup>10</sup> “Non U.S. Component Stock” means an equity security that is not registered under Section 12(b) or Section 12(g) of the Act and that is issued by an entity that (a) is not organized, domiciled, or incorporated in the United States, and (b) is an operating company (including real estate investment trusts and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). See NYSE Arca Equities Rule 5.2(j)(3).

<sup>11</sup> In approving this proposed 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>12</sup> 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3), one or more series of Derivative Securities Products may be included as a component comprising the index or portfolio underlying a series of Units.<sup>13</sup> The Commission notes that, based on the trading characteristics of Derivative Securities Products, it may be difficult for component Derivative Securities Products to satisfy certain quantitative index criteria, such as the minimum market value and trading volume limitations. However, because Derivative Securities Products are themselves subject to specific initial and continued listing requirements, the Commission believes that it would be reasonable to exclude Derivative Securities Products, as components, from certain index component eligibility criteria for Units. For example, the index component eligibility standards for Units and Portfolio Depositary Receipts require, among others, that there be a minimum of 13 component stocks in an underlying U.S. index or portfolio and a minimum of 20 component stocks in an international or global index or portfolio. If one or more series of Units or Portfolio Depositary Receipts constitutes, at least in part, a component of a U.S. or international index or portfolio underlying a series of Units, the Commission believes that not requiring a minimum number of components underlying such overlying Unit would be reasonable because each component Unit or Portfolio Depositary Receipt already requires a

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<sup>13</sup> Under Commentary .01(a) to NYSE Arca Equities Rule 5.2(j)(3), a series of a Derivative Securities Product may be included as a U.S. Component Stock or Non-U.S. Component Stock underlying a series of Units, so long as the shares of such series meet the definitions of U.S. Component Stock and Non-U.S. Component Stock, as applicable. See supra notes 7 and 10. See also Commentaries .01(a)(A)(5) and 01(a)(B)(5) to NYSE Arca Equities Rule 5.2(j)(3) (requiring that, in any event, all securities in the applicable index or portfolio must be a U.S. Component Stock listed on a national securities exchange and an NMS Stock, as defined in Rule 600 under the Act, or, in the case of an international or global index or portfolio, must be a Non-U.S. Component Stock that is listed and traded on an exchange that has last-sale reporting).

minimum of 13 or 20 component stocks, as the case may be. In addition, if one or more series of component Derivative Securities Products accounts for 100% of the weight of the index or portfolio underlying a series of Units, then a minimum number of components underlying such Units would not be required. The Commission notes that, if a series of Units is based on the performance of an underlying index or portfolio composed, in part, of a: (1) Unit or Portfolio Depositary Receipt and another non-Derivative Securities Product (e.g., common stock), or (2) Derivative Securities Product other than a Unit or Portfolio Depositary Receipt, then the minimum number of component stock requirement will continue to apply.

In addition, because component Derivative Securities Products may comprise 100% of the weight of any index underlying a series of Units, the Commission believes that providing for an exception to the concentration limits contained in Commentaries .01(a)(A)(3) and .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) with respect to component Derivative Securities Products is reasonable.<sup>14</sup> The Commission further notes that component Derivative Securities Products that are U.S. Component Stocks comprising, at least in part, an index or portfolio underlying a series of Units must meet the definition of NMS Stock<sup>15</sup> and already have been listed and trading on a national securities exchange pursuant to a proposed rule change approved by the Commission pursuant to Section 19(b)(2) of the Act<sup>16</sup> or submitted by a national

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<sup>14</sup> The Commission notes that it has approved the adoption of certain amendments to NYSE Arca Equities Rule 5.2(j)(6) allowing an index or portfolio underlying a series of Equity Index-Linked Securities to consist, in whole or in part, of (1) securities of closed-end management investment companies, or (2) Units, which, in each case, are registered under the Investment Company Act of 1940. See Securities Exchange Act Release No. 56879 (December 3, 2007), 72 FR 69271 (December 7, 2007) (SR-NYSEArca-2007-110).

<sup>15</sup> See supra note 8.

<sup>16</sup> 15 U.S.C. 78s(b)(2).



securities exchange pursuant to Section 19(b)(3)(A) of the Act,<sup>17</sup> or would have been listed by a national securities exchange pursuant to the requirements of Rule 19b-4(e) under the Act.<sup>18</sup>

Component Derivative Securities Products that are Non-U.S. Component Stocks comprising, at least in part, an international or global index or portfolio underlying a series of Units must already have been listed and trading on an exchange that has last-sale reporting.

The Commission believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in the proposal are intended to protect investors and the public interest. As such, the Commission believes it is reasonable and consistent with the Act for the Exchange to modify the index component eligibility criteria for Units in the manner described in the proposal.

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> See supra note 5.

<sup>19</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NYSEArca-2008-29), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).