

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58512; File No. SR-NYSEArca-2008-85)

September 11, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Listing and Trading of Shares of the PowerShares Active U.S. Real Estate Fund

On August 11, 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 proposed rule change to list and trade shares (“Shares”) of the PowerShares Active U.S. Real Estate Fund (“Fund”) under NYSE Arca Equities Rule 8.600. The proposed rule change was published in the Federal Register on August 26, 2008 for a 15-day comment period.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval to the proposed rule change on an accelerated basis.

I. Description of the Proposal

The Exchange proposes to list and trade the Shares pursuant to NYSE Arca Equities Rule 8.600, which governs the listing of Managed Fund Shares.<sup>4</sup> The Exchange states that the Shares will conform to the initial and continued listing criteria under that rule.

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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> See Securities Exchange Act Release No. 58395 (August 20, 2008), 73 FR 50382.

<sup>4</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (“1940 Act”) organized as an open-end management investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca

The Shares will be offered by PowerShares Actively Managed Exchange-Traded Fund Trust (“Trust”),<sup>5</sup> a business trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company. The Exchange states that the Fund will not purchase or sell securities in markets outside the United States. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Act,<sup>6</sup> as provided by NYSE Arca Equities Rule 5.3.

A. Description of the Fund

Invesco PowerShares Capital Management LLC (“Adviser”) is the investment adviser for the Fund and is registered as an “investment adviser” under the Investment Advisers Act of 1940 (“Advisers Act”).<sup>7</sup> Invesco Institutional (N.A.), Inc. is the Fund’s primary investment sub-

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Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index, or a combination thereof.

<sup>5</sup> The Trust is registered under the 1940 Act. On June 26, 2008, the Trust filed with the Commission a Registration Statement for the Fund on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-147622 and 811-22148) (“Registration Statement”). The Exchange states that the description of the operation of the Trust herein is based on the Registration Statement.

<sup>6</sup> 17 CFR 240.10A-3.

<sup>7</sup> 15 U.S.C. 80b-1. The Exchange represents that the Adviser and its related personnel are subject to Rule 204A-1 under the Advisers Act (17 CFR 275.204A-1). This rule specifically requires the adoption of a code of ethics by an investment adviser to include, at a minimum: (1) a standard or standards of business conduct that reflect the fiduciary obligations of such investment adviser and its supervised persons; (2) provisions requiring its supervised persons to comply with applicable federal securities laws; (3) provisions that require all access persons to report, and such investment adviser to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A-1; (4) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer (“CCO”) or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (5) provisions requiring the investment adviser to provide each of its supervised persons with a copy of the code of ethics and any amendments, and requiring its supervised persons to provide to such investment adviser written acknowledgement of their receipt of the code and any amendments. In addition, Rule 206(4)-7 under the

adviser and is also registered as an “investment adviser” under the Advisers Act. Invesco Aim Distributors, Inc. (the “Distributor”) serves as the principal underwriter and distributor for the Fund.<sup>8</sup>

The Exchange states that, according to the Registration Statement, the Fund has an investment objective of high total return through growth of capital and current income. It seeks to achieve its investment objective by investing, under normal market conditions, at least 80% of its assets in securities of companies that are principally engaged in the U.S. real estate industry.<sup>9</sup> Specifically, the Fund plans to invest principally in equity real estate investment trusts (“REITs”). Equity REITs pool investors’ funds for investments primarily in real estate properties or real estate-related loans (e.g., mortgages). The Fund may also invest in real estate operating companies (“REOCs”), as well as securities of other companies principally engaged in the U.S. real estate industry. REOCs are similar to REITs, except that REOCs reinvest their

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Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the rules adopted thereunder, (ii) reviewed no less frequently than annually the adequacy of the policies and procedures established pursuant to (i) above and the effectiveness of their implementation, and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under (i) above. See 17 CFR 275.206(4)-7.

<sup>8</sup> The Exchange states that the Adviser is affiliated with the Distributor, a broker-dealer. As required by Commentary .07 to NYSE Arca Equities Rule 8.600, the Exchange represents that the Adviser has implemented a “fire wall” with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund’s portfolio. Commentary .07 to NYSE Arca Equities Rule 8.600 also requires personnel, who make decisions on the portfolio composition of the Fund, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund’s portfolio.

<sup>9</sup> A company is considered to be principally engaged in the U.S. real estate industry if: (i) it derives 50% of its revenues or profits from the ownership, leasing, construction, financing, or sale of U.S. real estate; or (ii) it has at least 50% of the value of its assets invested in U.S. real estate.

earnings into the business, rather than distributing them to unit-holders like REITs. The 80% investment policy is non-fundamental and requires 60 days' prior written notice to shareholders before it can be changed. In constructing the portfolio, the sub-advisers (as described in the Registration Statement) analyze quantitative and statistical metrics to identify attractively priced securities. The security and portfolio evaluation process is generally conducted monthly. The sub-advisers will consider selling or reducing a security position if (1) the relative attractiveness of a security falls below desired levels, (2) a particular security's risk/return profile changes significantly, or (3) a more attractive investment opportunity is identified.

In addition, creations and redemptions of Shares will occur in large specified blocks referred to as "Creation Units." The Creation Unit size for the Fund is 50,000 Shares. The net asset value ("NAV") of the Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange LLC (ordinarily 4:00 p.m. Eastern time or "ET") on each business day.

B. Availability of Information

The Fund's Web site ([www.powershares.com](http://www.powershares.com)), which will be publicly available at no charge prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Web site will include additional quantitative information updated on a daily basis, including: (1) daily trading volume, the prior business day's reported closing price, NAV and the mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),<sup>10</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and

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<sup>10</sup> The Bid/Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2),<sup>11</sup> that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>12</sup>

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N-CSR and Form N-SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission's Web site.

Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line. In addition, the Portfolio Indicative Value ("PIV"), as defined in NYSE Arca Equities Rule 8.600 (c)(3),<sup>13</sup> will be disseminated by the Exchange at least every 15

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<sup>11</sup> The Disclosed Portfolio means the identities and quantities of the securities and other assets held by the Fund that will form the basis for the calculation of NAV at the end of the business day. See NYSE Arca Equities Rule 8.600(c)(2).

<sup>12</sup> Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

<sup>13</sup> The Portfolio Indicative Value is the estimated indicative value of a Managed Fund Share based on current information regarding the value of the securities and other assets in the Disclosed Portfolio. See NYSE Arca Equities Rule 8.600(c)(3).

seconds during the Core Trading Session through the facilities of CTA. The dissemination of the PIV, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of a Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

The Exchange states that more information regarding the Shares and the Fund, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes can be found in the Registration Statement.<sup>14</sup>

C. Initial and Continued Listing Criteria

The Fund will be subject to the initial and continued listing criteria of NYSE Arca Equities Rule 8.600(d). The Exchange established that a minimum of 100,000 Shares will be required to be outstanding at the time of commencement of trading on the Exchange. In addition, the Exchange has represented that it will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

D. Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.<sup>15</sup> Trading in the Shares will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also 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 comprising the Disclosed Portfolio and/or the financial

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<sup>14</sup> See supra note 5. All terms relating to the Fund that are referred to, but not defined in, the proposed rule change are defined in the Registration Statement.

<sup>15</sup> See Commentary .04 to NYSE Arca Equities Rule 7.12.

instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

E. Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. ET, in accordance with NYSE Arca Equities Rule 7.34 (Trading Sessions). The Exchange states that it has appropriate rules to facilitate transactions in the Shares during all trading sessions (Opening, Core Trading, and Late Trading Sessions). The minimum trading increment for the Shares on the Exchange will be \$0.01.

F. Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. 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 applicable federal securities laws. The Exchange states that its current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange further states that it may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of ISG. In addition, the

Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.

G. Information Bulletin

Prior to the commencement of trading, 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: (1) the procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (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 risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (4) how information regarding the PIV is disseminated; (5) 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 (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. ET each trading day.

II. Discussion and Commission’s Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>16</sup> and the rules and regulations

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<sup>16</sup> 15 U.S.C. 78f.



thereunder applicable to a national securities exchange.<sup>17</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>18</sup> which requires, among other things, that the Exchange's rules be designed 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 Commission 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,<sup>19</sup> 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 CTA high-speed line, and the Exchange will disseminate the PIV at least every 15 seconds during the Core Trading Session. In addition, the Fund will make available on its Web site the Disclosed Portfolio that will form the basis for its calculation of the NAV, which will be determined as of the close of the regular trading session on the New York Stock Exchange LLC.

The Exchange further states that information regarding the market price and volume of the Shares will be continually available on a real-time basis throughout the day via electronic services, and that the previous day's closing price and trading volume information for the Shares will be published daily in the financial sections of newspapers. The Fund's Web site, which will be publicly accessible at no charge, will include additional quantitative information updated on a

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<sup>17</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>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

daily basis, including: (1) daily trading volume, the prior business day's reported closing price, NAV, the Bid/Ask Price, and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

The Commission also 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 Commission notes that the Exchange will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Additionally, if it becomes aware that the NAV per Share or the Disclosed Portfolio is not disseminated daily to all market participants at the same time, the Exchange will halt trading in the Shares until that information is available to all market participants.<sup>20</sup> Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs and, 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>21</sup> The Commission notes that the Exchange represents that the Adviser has implemented a "fire wall" between it and the Distributor, an affiliated broker-dealer, regarding access to information concerning the composition and/or changes to the Fund's portfolio, as required by Commentary .07 to NYSE Arca Equities Rule 8.600. Finally, the Commission notes that the Reporting Authority, as

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<sup>20</sup> See NYSE Arca Equities Rule 8.600(d)(2)(D).

<sup>21</sup> See id.

defined in NYSE Arca Equities Rule 8.600(d)(2)(B)(ii),<sup>22</sup> that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities. 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 Rule 8.600.
- (2) The Exchange's surveillance 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 applicable federal securities laws.
- (3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in a Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular 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

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<sup>22</sup> The term "Reporting Authority" with respect to a particular series of Managed Fund Shares means NYSE Arca Equities, an institution, or a reporting service designed by NYSE Arca Equities or by the exchange that lists a particular series of Managed Fund Shares (if NYSE Arca Equities is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series including, but not limited to, the PIV, Disclosed Portfolio, amount of any cash distribution to holders of Managed Fund Shares, NAV, or other information relating to the issuance, redemption, or trading of Managed Fund Shares. See NYSE Arca Equities Rule 8.600(c)(4).

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 PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is 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.

(4) The Fund will be in compliance with Rule 10A-3 under the Act,<sup>23</sup> as provided by NYSE Arca Equities Rule 5.3.

(5) The Fund will not purchase or sell securities in markets outside the United States.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>24</sup> and the rules and regulations thereunder applicable to a national securities exchange.

### III. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> for approving the proposal prior to the thirtieth day after the date of publication of the Notice in the Federal Register. The Commission notes that it has approved the listing and trading on the Exchange of shares of other actively managed exchange-traded funds that are similar to the Shares of the Fund<sup>26</sup> and that it has received no comments regarding the proposed rule change.

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<sup>23</sup> See supra note 6.

<sup>24</sup> 15 U.S.C. 78f(b)(5).

<sup>25</sup> 15 U.S.C. 78s(b)(2).

<sup>26</sup> See, e.g., Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving the listing and trading of shares of the PowerShares Active AlphaQ Fund, the PowerShares Active Alpha Multi-Cap Fund,

The Commission finds that the proposed rule change does not raise any novel regulatory issues and believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for Managed Fund Shares.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change (SR-NYSEArca-2008-85) be, and it hereby is, approved on an accelerated basis.

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

Florence E. Harmon  
Acting Secretary

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the PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio).

<sup>27</sup> 15 U.S.C. 78s(b)(2).

<sup>28</sup> 17 CFR 200.30-3(a)(12).