

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57838; File No. SR-NYSEArca-2008-09)

May 20, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to the Listing and Trading of Shares of the AirShares™ EU Carbon Allowances Fund

I. Introduction

On March 14, 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: (1) adopt new NYSE Arca Equities Rule 8.204 relating to the listing and trading of Commodity Futures Trust Shares; (2) incorporate cross-references to Commodity Futures Trust Shares and proposed NYSE Arca Equities Rule 8.204 in certain Exchange rules; and (3) permit the listing and trading, or trading pursuant to unlisted trading privileges (“UTP”), of shares (“Shares”) of the AirShares™ EU Carbon Allowances Fund (“Fund”) under the proposed rule. On April 4, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended by Amendment No. 1 thereto, was published for comment in the Federal Register on April 15, 2008.<sup>3</sup> On May 14, 2008, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto.

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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. 57636 (April 8, 2008), 73 FR 20344 (“Notice”).

<sup>4</sup> In Amendment No. 2, the Exchange made minor, non-substantive changes to incorporate cross-references to Trust Units under NYSE Arca Equities Rule 8.500: (1) in the list of

## II. Description of the Proposed Rule Change

### A. Proposed Listing Rules for Commodity Futures Trust Shares

The Exchange proposes to adopt new NYSE Arca Equities Rule 8.204 to permit the listing and trading, or trading pursuant to UTP, of Commodity Futures Trust Shares. Proposed NYSE Arca Equities Rule 8.204(c) defines a Commodity Futures Trust Share as a security that: (1) is issued by a trust that (a) is a commodity pool, as defined in the Commodity Exchange Act (“CEA”) and regulations thereunder, managed by a commodity pool operator registered with the Commodity Futures Trading Commission (“CFTC”), and (b) holds positions in futures contracts<sup>5</sup> that track the performance of a specified commodity, or interests in a commodity pool which, in turn, holds such positions; and (2) is issued and redeemed daily in specified aggregate amounts at net asset value (“NAV”).

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securities for which the Core Trading Session (as defined herein) on the Exchange concludes at 4:15 p.m. Eastern Time (“ET”), as provided in NYSE Arca Equities Rule 7.34(a)(3); (2) in the definition of “Derivative Securities Product” as set forth in NYSE Arca Equities Rule 7.34(a)(4); and (3) in the list of securities included under the term “Derivative Securities Products” set forth in note 3 of the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services. See Securities Exchange Act Release No. 57059 (December 28, 2007), 73 FR 909 (January 4, 2008) (SR-NYSEArca-2006-76) (approving, among other things, the adoption of NYSE Arca Equities Rule 8.500 relating to the listing and trading of Trust Units). In addition, the Exchange made clarifying changes to NYSE Arca Equities Rule 7.34(a) and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Service to reflect the incorporation of cross-references to Managed Fund Shares under NYSE Arca Equities Rule 8.600 that was approved by the Commission subsequent to the date of the Notice. 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 NYSE Arca Equities Rule 8.600 relating to the listing and trading of Managed Fund Shares). Amendment No. 2 is technical in nature, and therefore is not subject to notice and comment.

<sup>5</sup> For purposes of the proposed rule: (1) the term “futures contract” is a “contract of sale of a commodity for future delivery” set forth in Section 2(a) of the CEA; and (2) the term “commodity” is defined in Section 1(a)(4) of the CEA.

Proposed NYSE Arca Equities Rule 8.204(d) provides that the Exchange may trade, either by listing or pursuant to UTP, Commodity Futures Trust Shares that are based on an underlying commodity futures contract. Each issue of Commodity Futures Trust Shares would be designated as a separate series and would be identified by a unique symbol.

The criteria for listing and trading Commodity Futures Trust Shares are set forth in proposed NYSE Arca Equities Rule 8.204(e). Proposed NYSE Arca Equities Rule 8.204(e)(1) provides that the Exchange will establish a minimum number of Commodity Futures Trust Shares that will be required to be outstanding at the time of commencement of trading. The continued listing criteria in proposed NYSE Arca Equities Rule 8.204(e)(2) provide for the suspension of trading in, or removal from listing of, the Commodity Futures Trust Shares under any of the following circumstances:

- If, following the initial 12-month period beginning upon the commencement of trading of the Shares: (1) the trust has fewer than 50,000 Shares issued and outstanding; (2) the market value of all Shares is less than \$1,000,000; or (3) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days;
- If the value of the underlying futures contract is no longer calculated or available on at least a 15-second delayed basis during the Exchange's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a), from a source unaffiliated with the sponsor, the trust, or the trustee;
- If the NAV for the trust is no longer disseminated to all market participants at the same time;
- If the Indicative Trust Value is no longer disseminated on at least a 15-second

delayed basis during the Exchange’s “Core Trading Session,” as defined in NYSE Arca Equities Rule 7.34(a);<sup>6</sup> or

- If such other event shall occur or condition exists that, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

In addition, the Exchange will remove the Commodity Futures Trust Shares from listing upon termination of the trust.

Proposed NYSE Arca Equities Rule 8.204(e)(3) provides that the term of a trust is as stated in the trust’s prospectus, and that the trust may be terminated “earlier” as may be specified in the prospectus. Proposed NYSE Arca Equities Rule 8.204(e)(4) sets forth proposed requirements for the trustee of a trust: (1) the trustee of a trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business; in cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee; and (2) no change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange. Proposed NYSE Arca Equities Rule 8.204(e)(5) provides that voting rights will be as set forth in the applicable trust prospectus.

Proposed NYSE Arca Equities Rule 8.204(f) sets forth certain restrictions on ETP

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<sup>6</sup> The Core Trading Session on the Exchange is from 9:30 a.m. to 4:00 or 4:15 p.m. ET. See NYSE Arca Equities Rule 7.34(a).

Holders acting as registered Market Makers<sup>7</sup> in Commodity Futures Trust Shares to facilitate surveillance. Proposed NYSE Arca Equities Rules 8.204(f)(2)-(3) require that the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares provide the Exchange with necessary information relating to its trading in the underlying commodity, related futures or options on futures, or any other related derivatives. Proposed NYSE Arca Equities Rule 8.204(f)(4) prohibits the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares from using any material non-public information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the underlying commodity, related futures or options on futures, or any other related derivative (including the Commodity Futures Trust Shares). In addition, proposed NYSE Arca Equities Rule 8.204(f)(1) prohibits the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares from being affiliated with a market maker in the underlying commodity, related futures or options on futures, or any other related derivative, unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

Proposed NYSE Arca Equities Rule 8.204(g) relates to the Exchange's limitation of liability. Proposed NYSE Arca Equities Rule 8.204(h) specifically provides that the Exchange will file separate proposals under Section 19(b) of the Act<sup>8</sup> before listing and trading separate and distinct series of Commodity Futures Trust Shares.

Commentary .01 to proposed NYSE Arca Equities Rule 8.204 requires ETP Holders to provide all purchasers of newly issued Commodity Futures Trust Shares with a prospectus.

Commentary .02 to proposed NYSE Arca Equities Rule 8.204 provides that trading in the

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<sup>7</sup> Section 1.1(u) defines "Market Maker" as "an ETP Holder that acts as a Market Maker pursuant to Rule 7."

<sup>8</sup> 15 U.S.C. 78s(b).

Commodity Futures Trust Shares will occur during the trading hours specified in NYSE Arca Equities Rule 7.34. Commentary .03 to proposed NYSE Arca Equities Rule 8.204 requires that if the Indicative Trust Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract occurs. If the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants. Commentary .04 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange's rules governing the trading of equity securities apply to Commodity Futures Trust Shares. Commentary .05 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange will implement written surveillance procedures for Commodity Futures Trust Shares.

B. Other Proposed Amendments<sup>9</sup>

The Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(3) to add references to Commodity Futures Trust Shares and proposed NYSE Arca Equities Rule 8.204 to the list of securities for which the Core Trading Session on the Exchange concludes at 4:15 p.m. ET. In addition, the Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(4) to include Commodity Futures Trust Shares under the definition of "Derivative Securities Product" with respect to trading halts of certain derivative securities products trading pursuant to UTP on the

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<sup>9</sup> See supra note 4.

Exchange. The Exchange also proposes to add Commodity Futures Trust Shares to the securities included under the term “Derivative Securities Products” in note 3 of the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services.

Proposal to List and Trade the Shares of the Fund

Pursuant to proposed NYSE Arca Equities Rule 8.204, the Exchange proposes to list and trade the Shares of the Fund.<sup>10</sup> The Exchange states that the Shares, which represent ownership of a fractional undivided beneficial interest in the net assets of the Fund, will conform to the initial and continued listing criteria under proposed NYSE Arca Equities Rule 8.204.

The investment objective of the Fund is to provide investors with investment results that correspond generally, before payment of the Fund’s expenses and liabilities, to the performance of a basket of exchange-traded futures contracts for carbon equivalent emissions allowances (“EUAs”) issued under the European Union Emissions Trading Scheme (“EU ETS”).<sup>11</sup> The EU ETS is a “cap and trade” emissions trading program instituted by the European Union (“EU”), in furtherance of the joint commitment of its member states under the Kyoto Protocol to achieve certain reductions in their emissions of greenhouse gases from 2008 to 2012. The Fund will not be actively managed in that it will not engage in activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the value of its portfolio of EUAs.

The net assets of the Fund will consist of long positions in ICE Futures ECX Carbon

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<sup>10</sup> The Exchange states that the Fund is not an investment company registered under the Investment Company Act of 1940, according to the Registration Statement on Form S-1 for the Fund, which was filed with the Commission on December 14, 2007 (File No. 333-145448) (“Registration Statement”).

<sup>11</sup> According to the Registration Statement, while the investment objective of the Fund is to track generally the value of the underlying futures contracts, the Fund’s portfolio of fixed income securities, as well as other factors such as the Fund’s expenses and its hedging activities, may cause a lack of correlation between the NAV of the Shares and the value of the Fund’s portfolio of futures contracts.

Financial Instrument Futures Contracts (“ECX CFI Futures Contracts”).<sup>12</sup> The ECX CFI Futures Contracts are standardized contractual instruments for futures on deliverable EUAs issued under the EU ETS and developed by the European Climate Exchange (“ECX”). ECX CFI Futures Contracts are listed and admitted to trading on ICE Futures on the London-based electronic platform, owned and operated by IntercontinentalExchange, Inc. (also known as the ICE Platform).<sup>13</sup> Each ECX CFI Futures Contract provides for delivery of 1,000 EUAs on a specified date at a specified price, with each EUA being an entitlement to emit one ton of carbon dioxide equivalent gas.<sup>14</sup> The Exchange states that, if the Fund invests in EUAs other than ECX CFI Futures Contracts, it will file a Form 19b-4 under the Act<sup>15</sup> to obtain Commission approval for the continued listing and trading of the Shares.<sup>16</sup>

More information about the structure of the Fund, the Kyoto Protocol, the EU ETS, the ECX CFI Futures Contracts, and the Fund’s investment objective and strategy, as well as further descriptions of the Shares, risks, NAV, and procedures for creations and redemptions of Shares,

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<sup>12</sup> The Fund represents that the ECX CFI Futures Contracts meets the definition of “futures contract” as set forth in Section 2(a) of the CEA. The Exchange further represents that carbon equivalent emissions allowances meet the definition of “commodity” as defined in Section 1(a)(4) of the CEA.

<sup>13</sup> The ECX CFI Futures Contracts trade on the London-based ICE Platform from 7:00 a.m. to 5:00 p.m. Greenwich Mean Time.

<sup>14</sup> The Exchange states that the ECX CFI Futures Contract had average daily trading volume of \$135,717,089 (USD), or approximately 87,587,602 Euro, representing 3,551 contracts traded daily from January 1, 2008 through March 11, 2008.

<sup>15</sup> 15 U.S.C. 78a.

<sup>16</sup> The Exchange also states that it will file a proposed change seeking approval to continue listing or trading the Shares if the Fund invests in EUAs that constitute more than 10% of the weight of the Fund and where the principal trading market for such component is not a member or affiliate member of the Intermarket Surveillance Group (“ISG”) or where the Exchange does not have a comprehensive surveillance sharing agreement with such market.



can be found in the Notice<sup>17</sup> and the Registration Statement,<sup>18</sup> as applicable.

Availability of Information Regarding the Fund and the Shares

The daily settlement prices for the EUAs are publicly available on the ICE Futures Web site at [www.icefutures.com](http://www.icefutures.com). In addition, various market data vendors and news publications publish futures prices and related data. Quote and last-sale information for the EUAs are widely disseminated through a variety of market data vendors worldwide. ICE Futures also provides delayed futures information on current and past trading sessions and market news free of charge on its Web site. The specific contract specifications for the EUAs are also available on the ICE Futures Web site.

The Web site for the Fund at [www.airsharesfund.com](http://www.airsharesfund.com), which is publicly accessible at no charge, will contain the following information: (1) the prior business day's NAV per Share<sup>19</sup> and the reported closing price; (2) the mid-point of the bid-ask price in relation to the NAV per Share as of the time the NAV is calculated ("Bid-Ask Price");<sup>20</sup> (3) calculation of the premium or discount of such price against such NAV per Share; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the Commission or required by the

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<sup>17</sup> See Notice, supra note 3.

<sup>18</sup> See supra note 9.

<sup>19</sup> The most recent end-of-day NAV of the Fund and NAV per Share will be published by the Fund sponsor as of 4:00 p.m. ET on Reuters and/or Bloomberg and on the Fund's Web site at [www.airsharesfund.com](http://www.airsharesfund.com). The end-of-day NAV per Share will also be published the following morning on the consolidated tape.

<sup>20</sup> The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV per Share.

CFTC;<sup>21</sup> and (6) other applicable quantitative information.

The Fund's total portfolio composition, consisting primarily of long positions in ECX CFI Futures Contracts and cash, will be disclosed each business day that the Exchange is open for trading on the Fund's Web site. The Fund has informed the Exchange that Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each EUA and amount of cash held in the portfolio of the Fund.

As noted above, the Fund's NAV will be calculated and disseminated daily.<sup>22</sup> The Exchange will disseminate for the Fund on a daily basis by means of Consolidated Tape Association CQ High Speed Lines information with respect to the Indicative Fund Value (as discussed below), recent Fund NAV, Shares outstanding, and the Basket amount. The Exchange will also make available on its Web site daily trading volume, closing prices, and the Fund's NAV per Share. The closing price and settlement prices of the EUAs held by the Fund are also readily available from ICE Futures, automated quotation systems, published or other public sources, or on-line information services.

Information regarding market price and 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. 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 facilities of the Consolidated Tape Association.

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<sup>21</sup> Monthly account statements conforming to CFTC and National Futures Association requirements are posted on the Fund's Web site at [www.airsharesfund.com](http://www.airsharesfund.com). Additional reports may be posted on the Fund's Web site in the discretion of the Fund sponsor or as required by regulatory authorities.

<sup>22</sup> The Exchange will obtain a representation from the Fund that the Fund's NAV per Share will be calculated daily and made available to all market participants at the same time. See Notice at 20347, n.16.

All pricing information will be quoted in U.S. dollars, other than the current trading value of the Euro-denominated EUAs, which will be quoted in Euro. The current trading price per Share will be published continuously as trades occur throughout each trading day on the consolidated tape, Reuters, and/or Bloomberg. The most recent trading value of each EUA is published on the Web site of the ECX at [www.ecxeurope.com](http://www.ecxeurope.com), under the heading “Market Data,” and each vintage futures contract in the Fund’s portfolio will be published on the Fund’s Web site at [www.airsharesfund.com](http://www.airsharesfund.com), or any successor thereto.

To provide updated information relating to the Fund for use by investors, professionals and persons wishing to create or redeem the Shares, the Exchange or a major market data vendor will disseminate through the facilities of the Consolidated Tape Association an updated Indicative Fund Value (“Indicative Fund Value”).<sup>23</sup> The Indicative Fund Value, which is also known as intraday indicative value (IIV) or intraday optimized portfolio value (IOPV), is an estimate, updated on a real-time basis at least every 15 seconds, of the NAV, which is disclosed only once per day. The Indicative Fund Value for the Fund will be disseminated on a per-Share basis at least every 15 seconds during the Exchange’s Core Trading Session. The Indicative Fund Value will be calculated based on the previously-disclosed portfolio composition of the Fund, i.e., the futures contracts in the Fund’s portfolio, and will be adjusted to reflect the price changes of the relevant EUAs.

The value of a Share may be influenced by the non-concurrent trading hours between the Exchange and the exchanges on which the EUAs trade. While the Shares will trade from 4:00 a.m. to 8:00 p.m. ET, the ECX CFI Futures Contracts, for example, trade on the London-based ICE Platform from 7:00 a.m. to 5:00 p.m. local time in London, England. When the ICE

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<sup>23</sup> The Indicative Fund Value is referred to as the Indicative Trust Value in proposed new NYSE Arca Equities Rule 8.204(e)(2)(iv).

Platform and the Exchange are both open for trading, the Indicative Fund Value can be expected to closely approximate the NAV per Share. When the ICE Platform is closed and the Exchange is open, trading spreads and the resulting premium or discount on the Shares may widen and, therefore, increase the difference between the public trading price of the Shares and the NAV per Share. The Indicative Fund Value on a per-Share basis disseminated during the Exchange's Core Trading Session should not be viewed as a real-time update of the Fund's NAV, which is calculated only once a day.

#### 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.<sup>24</sup> Trading in the Shares will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading may also 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 underlying EUA futures contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Commentary .03 to proposed NYSE Arca Equities Rule 8.204, which sets forth circumstances under which trading in the Shares may be halted.

#### Trading Rules

Under proposed NYSE Arca Equities Rule 8.204(b), Commodity Futures Trust Shares are included within the Exchange's definition of "securities." 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. Commentary .02 to proposed NYSE Arca Equities

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<sup>24</sup> See Commentary .04 to NYSE Arca Equities Rule 7.12.

Rule 8.204 provides that transactions in Commodity Futures Trust Shares will occur during the trading hours specified in Rule 7.34. Therefore, in accordance with such rule, the Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. ET. The Exchange states that it has appropriate rules to facilitate transactions in the Shares during all three trading sessions.

### Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which will include Commodity Futures Trust 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's 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 may obtain information via the ISG from other exchanges who are members or affiliate members of the ISG. In addition, the Exchange has an information sharing agreement in place with ICE Futures for the purpose of providing information in connection with trading in, or related to, futures contracts traded on ICE Futures. The Exchange states that it will file a proposed change pursuant to Rule 19b-4 under the Act<sup>25</sup> seeking approval to continue trading the Shares if the Fund invests in EUAs (or pricing information is used for a new or existing component) that constitute more than 10% of the weight of the Fund where the principal trading market for such component is not a member or affiliate member of ISG or where the

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<sup>25</sup> 17 CFR 240.19b-4.

Exchange does not have a comprehensive surveillance sharing agreement with such market. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

#### Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders<sup>26</sup> 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 risks involved in trading the Shares during the Opening and Late Trading Sessions<sup>27</sup> when an updated Indicative Fund Value will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares (and that Shares are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a),<sup>28</sup> 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; (4) the risk involved in trading the Shares during the Core and Late Trading Sessions when the ECX CFI Futures Contracts are not trading on the ICE Platform; (5) how information regarding the Indicative Fund Value is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction;

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<sup>26</sup> See NYSE Arca Equities Rule 1.1(n) (defining ETP Holder).

<sup>27</sup> The Opening Trading Session is from 4:00 a.m. to 9:30 a.m. ET and the Late Trading Session is from 4:15 p.m. to 8:00 p.m. ET. See NYSE Arca Equities Rule 7.34.

<sup>28</sup> NYSE Arca Equities Rule 9.2(a) provides that ETP Holders, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer’s financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation.

and (7) trading information.

In addition, the Bulletin will reference that: (1) the Fund is subject to various fees and expenses described in the relevant registration statement; (2) that there is no regulated source of last-sale information regarding physical commodities; (3) the Commission has no jurisdiction over the trading of EUAs; and (4) the Financial Services Authority in the United Kingdom has regulatory jurisdiction over the trading of EUAs and related options. The Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act and disclose that the NAV for the Shares will be calculated after 4:00 p.m. ET each trading day.

### III. 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>29</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>30</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>31</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 notes that it has approved similar NYSE Arca Equities rules to list and trade products based on or related to commodities.<sup>32</sup>

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<sup>29</sup> 15 U.S.C. 78f.

<sup>30</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>31</sup> 15 U.S.C. 78f(b)(5).

<sup>32</sup> See Securities Exchange Act Release Nos. 54025 (June 21, 2006), 71 FR 36856 (June 28, 2006) (SR-NYSEArca-2006-12) (approving new NYSE Arca Equities Rule 8.203

A. Proposed Amendments to NYSE Arca Equities Rules

The Commission finds that NYSE Arca's proposal contains adequate rules and procedures to govern the listing and trading of Commodity Futures Trust Shares on the Exchange. Prior to listing and/or trading on the Exchange, NYSE Arca must file a separate proposed rule change pursuant to Section 19(b) of the Act for each series of Commodity Futures Trust Shares.<sup>33</sup> All such securities listed and/or traded under proposed NYSE Arca Equities Rule 8.204 will be subject to the full panoply of NYSE Arca rules and procedures that currently govern the trading of equity securities on the Exchange.<sup>34</sup> For the initial listing of each series of Commodity Futures Trust Shares under proposed NYSE Arca Equities Rule 8.204, the Exchange must establish a minimum number of Commodity Futures Trust Shares required to be outstanding at the commencement of trading on the Exchange.<sup>35</sup>

The Commission believes that the proposed continued listing and trading standards under

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“Commodity-Indexed Trust Shares” for trading pursuant to UTP the iShares GSCI Commodity-Indexed Trust); 51067 (January 21, 2005), 70 FR 3952 (January 27, 2005) (SR-PCX-2004-132) (approving new NYSE Arca Equities Rule 8.201 “Commodity-Based Trust Shares” for trading pursuant to UTP the iShares COMEX Gold Trust); 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR-NYSEArca-2007-43) (approving listing of shares of iShares COMEX Gold Trust pursuant to NYSE Arca Equities Rule 8.201); 53875 (May 25, 2006), 71 FR 32164 (June 2, 2006) (SR-NYSEArca-2006-11) (approving new NYSE Arca Equities Rule 8.300 “Partnership Shares” for trading pursuant to UTP the United States Oil Fund, LP); and 53736 (April 27, 2006), 71 FR 26582 (May 5, 2006) (SR-PCX-2006-22) (approving new Commentary .02 to NYSE Arca Equities Rule 8.200 “Investment Shares” for trading pursuant to UTP the DB Commodity Index Tracking Fund).

<sup>33</sup> See proposed NYSE Arca Equities Rule 8.204(h).

<sup>34</sup> Commentary .04 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange's rules governing the trading of equity securities apply to Commodity Futures Trust Shares.

<sup>35</sup> See proposed NYSE Arca Equities Rule 8.204(e)(1).



proposed NYSE Arca Equities Rule 8.204 are adequate to ensure transparency of key values and information regarding the securities. The Exchange may consider suspending trading in, or removing from listing, a series of Commodity Futures Trust Shares if: (1) following the initial twelve-month period beginning upon the commencement of trading of the Commodity Futures Trust Shares, (a) the Trust has fewer than 50,000 Commodity Futures Trust Shares issued and outstanding; (b) the market value of all Commodity Futures Trust Shares issued and outstanding is less than \$1,000,000, or (c) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days; (2) the value of the underlying futures contracts is no longer calculated or available on at least a 15-second delayed basis during the Exchange's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a), from a source unaffiliated with the sponsor, the trust or the trustee of the trust; (3) the NAV for the trust is no longer disseminated to all market participants at the same time; (4) the Indicative Trust Value is no longer disseminated on at least a 15-second delayed basis during the Corporation's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a); or (5) such other event shall occur or condition exists which in the opinion of the Corporation makes further dealings on the Corporation inadvisable.<sup>36</sup>

The Commission finds that the Exchange's rules with respect to trading halts under proposed NYSE Arca Equities Rule 8.204 should help ensure the availability of key values and information relating to Commodity Futures Trust Shares. If the Indicative Trust Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract occurs; if the interruption to the

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<sup>36</sup> See proposed NYSE Arca Equities Rule 8.204(e)(2)(i)-(v).

dissemination of the Indicative Trust Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.<sup>37</sup> In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants.<sup>38</sup> Lastly, the Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(4) to include Commodity Futures Trust Shares under “Derivative Securities Products” with respect to trading halts of certain derivative securities products trading pursuant to UTP on the Exchange. The Commission believes that the foregoing requirements of the Exchange’s proposed rules should help to prevent trading when a reasonable degree of transparency cannot be assured and to maintain a fair and orderly market for Commodity Futures Trust Shares.

The Commission also believes that the proposed listing and trading rules for Commodity Futures Trust Shares are reasonably designed to promote a fair and orderly market for such securities by, among other things, requiring ETP Holders acting as registered Market Makers in Commodity Futures Trust Shares to be subject to certain restrictions in dealings and trading activities, to maintain and present, upon request, appropriate books and records, and to be subject to restrictions governing the use of any material, non-public information in connection with the trading of Commodity Futures Trust Shares and any underlying components.<sup>39</sup> The proposed rule also requires the implementation of written surveillance procedures<sup>40</sup> and prescribes

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<sup>37</sup> See Commentary .03 to proposed NYSE Arca Equities Rule 8.204.

<sup>38</sup> See id.

<sup>39</sup> See proposed NYSE Arca Equities Rule 8.204(f)(1)-(4).

<sup>40</sup> See Commentary .05 to proposed NYSE Arca Equities Rule 8.204.

prospectus delivery requirements for purchasers of each newly issued series of Commodity Futures Trust Shares.<sup>41</sup>

As proposed, the Exchange's listing fees will be applicable to a series of Commodity Futures Trust Shares under the Schedule of Fees and Charges for Exchange Services. In connection with proposed NYSE Arca Equities Rule 8.204, the Exchange also proposes to make certain technical revisions so that Commodity Futures Trust Shares are also included among the types of securities referenced in NYSE Arca Equities Rule 7.34 relating to trading hours and trading halts. The Commission finds that the changes made to the Exchange's listing fees and the technical revisions to NYSE Arca Equities Rule 7.34 are reasonable and promote transparency and consistent application of certain rules imposed with respect to a series of Commodity Futures Trust Shares.

B. Proposal to List and Trade the Shares of the Fund

The Commission finds that the proposal to list and trade the Shares on the Exchange is

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<sup>41</sup> See Commentary .01 to proposed NYSE Arca Equities Rule 8.204.

consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>42</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. Quotations and last-sale information for EUAs are widely disseminated through a variety of market data vendors worldwide, and the daily settlement prices for the EUAs are publicly available on the ICE Futures Web site. In addition, quotations and last-sale information for the Shares will be available via the facilities of the Consolidated Tape Association. The daily NAV for the Fund will be calculated and disseminated publicly to all market participants at the same time, and the Exchange or a major market data vendor will disseminate through the facilities of the Consolidated Tape Association an updated Indicative Fund Value on a real-time basis at least every 15 seconds during the Exchange's Core Trading Session. The Fund's Web site will provide information relating to NAV, the Fund's daily total portfolio composition, the Fund's prospectus and other reports filed with the Commission, and other applicable quantitative information. Additionally, the Exchange will make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the Fund's NAV per Share.

Furthermore, 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 Commission notes that the Exchange will obtain a representation from the Fund that the NAV per Share for the Fund will be calculated daily and made available to all market

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<sup>42</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

participants at the same time.<sup>43</sup> The Exchange may consider the suspension of trading in, or removal from listing of, the Shares if the value of the underlying futures contracts, the NAV, or the Indicative Fund Value is no longer calculated or available as required under proposed NYSE Arca Equities Rule 8.204(e)(2). In addition, proposed NYSE Arca Equities Rule 8.204(f) restricts ETP Holders from engaging in certain trading activities with respect to dealings in Commodity Futures Trust Shares and prescribes certain other restrictions regarding the use of material, non-public information.

For the reasons discussed above, the Commission believes that the Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. Commentary .03 to proposed NYSE Arca Equities Rule 8.204 provides that, if the Indicative Fund Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Fund Value or the value of the underlying futures contract occurs; if the interruption to the dissemination of the Indicative Fund Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.<sup>44</sup> In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants.<sup>45</sup>

Trading in the Shares also will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading may also be halted because of market conditions or for

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<sup>43</sup> See supra note 22.

<sup>44</sup> See Commentary .03 to proposed NYSE Arca Equities Rule 8.204.

<sup>45</sup> See id.

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 underlying EUA futures contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. 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 proposed NYSE Arca Equities Rule 8.204(e).
- (2) The Exchange's surveillance procedures applicable to derivative products (which will include Commodity Futures 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.
- (3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in the Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss, among other things, the following:
  - (a) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Indicative Fund Value will not be calculated or publicly disseminated;
  - (b) the procedures for purchases and redemptions of Shares (and that Shares are not individually redeemable);
  - (c) 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; (d) the risk involved in trading the Shares during the Core and Late Trading Sessions when the ECX CFI Futures Contracts are not trading on the ICE Platform; (e) how information regarding the Indicative Fund Value is disseminated; (f) 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 (g) trading information.

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

The Commission believes that the proposal should help to facilitate the listing and trading of additional types of exchange-traded products that should enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the Commission believes that the listing and trading criteria for Commodity Futures Trust Shares set forth in proposed NYSE Arca Equities Rule 8.204 are reasonably designed to protect investors and the public interest, as discussed herein. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.<sup>46</sup>

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<sup>46</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>47</sup> that the proposed rule change (SR-NYSEArca-2008-09), as modified by Amendment Nos. 1 and 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>48</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>47</sup> 15 U.S.C. 78s(b)(2).

<sup>48</sup> 17 CFR 200.30-3(a)(12).