

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59173; File No. SR–NYSEArca–2008–125]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing of Units of the United States Short Oil Fund

December 29, 2008.

On November 18, 2008, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) 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 units (“Units”) of the United States Short Oil Fund, LP (“USSO” or “Partnership”). The proposed rule change was published in the **Federal Register** on December 1, 2008 for a 15-day comment period.<sup>3</sup> The Commission received no comments on the proposal. On December 29, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order provides notice of the filing of Amendment No. 1 and approves the proposed rule change, as modified by Amendment No. 1 thereto, on an accelerated basis.

#### I. Description of the Proposal

NYSE Arca, through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), proposes to list and trade the Units of USSO pursuant to NYSE Arca Equities Rule 8.300, which governs the trading of Partnership Units.<sup>5</sup> USSO, a Delaware limited partnership, is managed and controlled by United States Commodity Funds LLC (“General Partner”), a single member limited liability company that is (1) registered as a commodity pool operator with the Commodity Futures Trading Commission (“CFTC”) and (2) a

member of the National Futures Association. The General Partner is not affiliated with a broker-dealer. USSO will comply with the requirements of Rule 10A–3 under the Act<sup>6</sup> as it applies to limited partnerships.

The investment objective of USSO is to have the changes in percentage terms of the Units’ net asset value (“NAV”) inversely reflect the changes in percentage terms of the spot price of light, sweet crude oil delivered to Cushing, Oklahoma, as measured by the changes in the price of the futures contract on light, sweet crude oil as traded on the New York Mercantile Exchange (“NYMEX”). The futures contract employed is the near month expiration contract, except when the near month contract is within two weeks of expiration, in which case the futures contract will be the next month contract to expire (“Benchmark Futures Contract”), less USSO’s expenses.<sup>7</sup> In pursuing this objective, the primary focus of the General Partner will be taking short positions in futures contracts<sup>8</sup> and the management of investments in short-term obligations of the United States of two years or less (“Treasuries”), and cash and/or cash equivalents for margining purposes and as collateral.

Additional information about USSO, including its investing strategy and holdings, Basket Amount calculation, creations and redemptions of Units, dissemination and availability of information, trading rules, trading halts, surveillance, and information bulletin, among other things, is contained in the Notice and the Registration Statement.<sup>9</sup>

#### II. Discussion and Commission 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>10</sup>

and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>12</sup> which requires, among other things, that the Exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange proposes to list and trade the Units pursuant to NYSE Arca Equities Rule 8.300. NYSE Arca represents that the Units satisfy the applicable requirements of Rule 8.300, which includes initial and continued listing criteria.<sup>13</sup>

The Commission believes that the proposal to list and trade the Units on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>14</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 regarding the Units will be disseminated through the facilities of the CTA. The value of the underlying benchmark investment, commodity, or asset of the Units (the price information for applicable Futures Contracts) will be calculated and available on a real-time basis at least every 15 seconds between 10 a.m. and 2:30 p.m. Eastern Time (“ET”), the normal NYMEX trading hours for the Futures Contracts.<sup>15</sup>

In addition, USSO’s total portfolio composition will be disclosed each business day that the NYSE Arca is open for trading on USSO’s Web site, which is publicly accessible at no charge. This disclosure will include, as applicable, the name and value of each Crude Oil Interest, the specific types of Other Crude Oil-Related Investments and characteristics of such Other Crude Oil-Related Investments, Treasuries, and the amount of cash and cash equivalents

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> Securities Exchange Act Release No. 58994 (November 21, 2008), 73 FR 72892 (“Notice”).

<sup>4</sup> In Amendment No. 1, NYSE Arca: (1) Represented that the Units satisfy the requirements of NYSE Arca Equities Rule 8.300 and thereby qualify for listing on the Exchange; (2) designated the Futures Contracts (as defined herein) as the sole underlying benchmark investment, commodity, or asset for purposes of NYSE Arca Equities Rule 8.300(d)(2)(ii); and (3) clarified that price information for the Futures Contracts is calculated or available on at least a 15-second delayed basis.

<sup>5</sup> USSO has filed with the Commission Amendment No. 1 to Form S–1, dated September 29, 2008 (File No. 333–152386) (“Registration Statement”).

<sup>6</sup> 17 CFR 240.10A–3.

<sup>7</sup> The Benchmark Futures Contract will be changed or “rolled” from the near month contract to expire to the next month contract to expire during one day.

<sup>8</sup> The net assets of USSO will consist primarily of short positions in futures contracts for crude oil, heating oil, gasoline, natural gas, and other petroleum-based fuels that are traded on NYMEX, ICE Futures, or other U.S. and foreign exchanges (collectively, “Futures Contracts”). USSO may also take short positions in other crude oil-related investments such as cash-settled options on Futures Contracts, forward contracts for crude oil, and over-the-counter transactions that are based on the price of crude oil and other petroleum-based fuels, Futures Contracts, and indices based on the foregoing (collectively, “Other Crude Oil-Related Investments”).

<sup>9</sup> See *supra* notes 3 and 5. Terms referred to, but not defined herein, have the same meaning set forth in the Notice.

<sup>10</sup> 15 U.S.C. 78f.

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

<sup>13</sup> See *supra* note 4.

<sup>14</sup> 15 U.S.C. 78k–1(a)(1)(C)(iii).

<sup>15</sup> See *supra* note 4.

held in USSO's portfolio. NYSE Arca will calculate and disseminate through the facilities of CTA/CQ High Speed Lines an IPV, on a per Unit basis, updated every 15 seconds between 10 a.m. and 2:30 p.m. ET.<sup>16</sup> Additionally, the IPV will be published on the NYSE Arca's Web site and will be available through on-line information services such as Bloomberg and Reuters.

Lastly, the Administrator will calculate NAV once each trading day and the NAV for a particular trading day will be released after 4 p.m. ET. The Administrator will calculate NAV as of the earlier of the close of the New York Stock Exchange or 4 p.m. ET. USSO will use the NYMEX closing price (determined at the earlier of the close of that Exchange or 2:30 p.m. ET) for the contracts held on NYMEX, but will calculate or determine the value of all other USSO investments as of the earlier of the close of the NYSE Arca Core Trading Session or 4 p.m. ET.

The Commission also believes that the proposal to list and trade the Units is reasonably designed to promote fair disclosure of information that may be necessary to price the Units appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. NYSE Arca Equities Rule 8.300(d)(2)(ii) provides that NYSE Arca Equities will consider removing from listing Partnership Units if the value of the underlying benchmark investment, commodity or asset is no longer calculated or available on at least a 15-second delayed basis or NYSE Arca Equities stops providing a hyperlink on its Web site to any such investment, commodity or asset value. In addition, if the value of the underlying benchmark investment, commodity or asset or IPV applicable to the Units is not being disseminated as required, the Exchange may halt trading in the Units during the day on which the interruption first occurs. If such interruption 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. Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Units is not being disseminated to all market participants at the same time, it will halt trading in the Units on the Exchange until such time as the NAV is available to all market participants. Further, if the portfolio composition applicable to the Units (disseminated via USSO's Web site) is not

disseminated to all market participants at the same time, the Exchange will halt trading in the affected Units. Moreover, NYSE Arca Equities Rule 8.300(e) limits certain dealings and trading activity of ETP Holders acting as registered Market Makers in Units, prescribes various recordkeeping and disclosure requirements for ETP Holders, and prohibits the use of any material non-public information regarding trading in the underlying physical asset or commodity, futures or options on futures, or any other related derivatives.

The Commission further believes that the trading rules and procedures to which the Units will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that the Units are equity securities subject to NYSE Arca's rules governing the trading of equity securities.

*In support of this proposal, the Exchange has made the following representations:*

1. The Units satisfy the requirements of NYSE Arca Equities Rule 8.300, which includes the initial and continued listing criteria for Partnership Units.<sup>17</sup>

2. The Exchange's surveillance procedures are adequate to properly monitor trading of the Units in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

3. The Exchange will distribute an Information Bulletin, the contents of which are more fully described in the Notice, to ETP Holders in connection with the trading of the Units.

4. USSO will comply with the requirements of Rule 10A-3 under the Act<sup>18</sup> as it applies to limited partnerships.

This order is based on the Exchange's representations.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes that it has previously approved the listing and trading, or trading pursuant to unlisted trading privileges ("UTP"), of Partnership Units that are similar to the Units.<sup>20</sup> The Commission also notes

that it has previously approved the listing and trading of certain funds that are based on underlying commodity or currency benchmarks that seek daily investment results, before fees and expenses, that correspond to twice (200%) the daily performance of the underlying benchmark or twice the inverse (-200%) of the daily performance of the underlying benchmark.<sup>21</sup> No comments were received on the proposed rule change during the 15-day comment period, and the Commission believes that the Exchange's proposal to list and trade the Units, as modified by Amendment No. 1 thereto, does not present any novel or significant regulatory issues. As such, the Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such products.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1 to the proposed rule change, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

units of the United States 12 Month Oil Fund, LP and United States 12 Month Natural Gas Fund, LP); 55632 (April 13, 2007), 72 FR 19987 (April 20, 2007) (SR-Amex-2006-112) (approving the listing of units of the United States Natural Gas Fund, LP); and 57188 (January 23, 2008), 73 FR 5607 (January 30, 2008) (SR-Amex-2007-70) (approving the listing of units of the United States Heating Oil Fund, LP and United States Gasoline Fund, LP). *See also, e.g.,* Securities Exchange Act Release Nos. 56832 (November 21, 2007), 72 FR 67328 (November 28, 2007) (SR-NYSEArca-2007-102) (approving the trading of units of the United States 12 Month Oil Fund, LP and United States 12 Month Natural Gas Fund, LP pursuant to UTP); 56042 (July 11, 2007), 72 FR 39118 (July 17, 2007) (SR-NYSEArca-2007-45) (approving the trading of units of the United States Natural Gas Fund, LP pursuant to UTP); and 57294 (February 8, 2008), 73 FR 8917 (February 15, 2008) (SR-NYSEArca-2007-78) (approving the trading of units of the United States Heating Oil Fund, LP and United States Gasoline Fund, LP pursuant to UTP).

<sup>21</sup> *See, e.g.,* Securities Exchange Act Release Nos. 58161 (July 15, 2008), 73 FR 42380 (July 21, 2008) (SR-Amex-2008-39) (approving the listing of shares of the ProShares Ultra DJ-AIG Commodity, ProShares UltraShort DJ-AIG Commodity, ProShares Ultra DJ-AIG Agriculture, ProShares UltraShort DJ-AIG Agriculture, ProShares Ultra DJ-AIG Crude Oil, ProShares UltraShort DJ-AIG Crude Oil, ProShares Ultra Gold, ProShares UltraShort Gold, ProShares Ultra Silver, ProShares UltraShort Silver, ProShares Ultra Euro, ProShares UltraShort Euro, ProShares Ultra Yen, and ProShares UltraShort Yen Funds (collectively, the "Funds")); and 58457 (September 3, 2008), 73 FR 52711 (September 10, 2008) (SR-NYSEArca-2008-91) (approving the listing of shares of the Funds on the Exchange).

<sup>16</sup> See Notice *supra* note 3, 73 FR at 72896, n.16, and accompanying text.

<sup>17</sup> See *supra* note 4.

<sup>18</sup> 17 CFR 240.10A-3.

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

<sup>20</sup> See, e.g., Securities Exchange Act Release Nos. 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR-Amex-2005-127) (approving the listing of units of the United States Oil Fund, LP); 56831 (November 21, 2007), 72 FR 67612 (November 29, 2007) (SR-Amex-2007-98) (approving the listing of

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2008-125 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-NYSEArca-2008-125. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2008-125 and should be submitted on or before January 26, 2009.

### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>22</sup> that the proposed rule change (SR-NYSEArca-2008-125), as modified by Amendment No. 1 thereto, 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>23</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Docket No. AB-290 (Sub-No. 304X)]

#### Norfolk Southern Railway Company— Abandonment Exemption—in Henry County, VA

Norfolk Southern Railway Company (NSR) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 4.20-mile line of railroad between milepost DW 41.60, and milepost DW 45.80, in Martinsville, Henry County, VA. The line traverses United States Postal Service Zip Code 24112 and includes the former stations of Martinsville and Jones Creek.

NSR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on February 5, 2009, unless stayed pending reconsideration.<sup>1</sup> Petitions to stay that

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> NSR's representative has been informed that the earliest this transaction may be consummated is February 5, 2009. NSR originally indicated a consummation date of February 4, 2009.

do not involve environmental issues,<sup>2</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>3</sup> and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 16, 2009. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 26, 2009, with: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to NSR's representative: James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

NSR has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by January 9, 2009. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 245-0305. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.) Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by January 6, 2010, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at [WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).

<sup>2</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>3</sup> Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. See 49 CFR 1002.2(f)(25).

<sup>22</sup> 15 U.S.C. 78s(b)(2).