

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** OMB requests comments on 2006 Draft Report to Congress on the Costs and Benefits of Federal Regulation. The full Draft Report is available at [http://www.whitehouse.gov/omb/infocreg/regpol-reports\\_congress.html](http://www.whitehouse.gov/omb/infocreg/regpol-reports_congress.html), and is divided into three chapters. Chapter I presents estimates of the costs and benefits of Federal regulation and paperwork, with an emphasis on the major regulations issued between October 1, 2004 and September 30, 2005. Chapter II provides an update on OMB's ongoing historical examination of the trends in Federal regulatory activity. Chapter III discusses international developments in regulatory policy.

**DATES:** To ensure consideration of comments as OMB prepares this Draft Report for submission to Congress, comments must be in writing and received by July 12, 2006.

**ADDRESSES:** We are still experiencing delays in the regular mail, including first class and express mail. To ensure that your comments are received, we recommend that comments on this draft report be electronically mailed to [OIRA\\_BC\\_RPT@omb.eop.gov](mailto:OIRA_BC_RPT@omb.eop.gov), or faxed to (202) 395-7245. You may also submit comments to Lorraine Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, NEOB, Room 10202, 725 17th Street, NW., Washington, DC 20503. For Further Information, contact: Lorraine Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, NEOB, Room 10202, 725 17th Street, NW., Washington, DC 20503. Telephone: (202) 395-3084. All comments submitted in response to this notice will be made available to the public, including by posting them on OMB's Web site. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information.

**SUPPLEMENTARY INFORMATION:** Congress directed the Office of Management and Budget (OMB) to prepare an annual Report to Congress on the Costs and Benefits of Federal Regulations. Specifically, Section 624 of the FY 2001 Treasury and General Government Appropriations Act, also known as the "Regulatory Right-to-Know Act," (the Act) requires OMB to submit a report on the costs and benefits of Federal regulations together with recommendation for reform. The Act states that the report should contain

estimates of the costs and benefits of regulations in the aggregate, by agency and agency program, and by major rule, as well as an analysis of impacts of Federal regulation on State, local, and tribal governments, small businesses, wages, and economic growth. The Act also states that the report should go through notice and comment and peer review.

**Donald R. Arbuckle,**

*Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs.*

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**BILLING CODE 3110-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27283; 812-12947]

### Van Eck Associates Corporation, et al.; Notice of Application

April 7, 2006.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 24(d) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(f) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

*Summary of Application:* Applicants request an order that would permit (a) series of open-end management investment companies, to issue shares ("Shares") that can be redeemed only in large aggregations ("Creation Units"); (b) secondary market transactions in Shares to occur at negotiated prices; (c) dealers to sell Shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 ("Securities Act"); (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

*Applicants:* Van Eck Associates Corporation (the "Adviser"); Market Vectors—Gold Miners ETF (the "Trust"); and Van Eck Securities Corporation (the "Distributor").

*Filing Dates:* The application was filed on March 25, 2003, and amended on February 3, 2006. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in the notice.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 1, 2006, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090; Applicants, 99 Park Avenue, 8th Floor, New York, NY 10016.

**FOR FURTHER INFORMATION CONTACT:** Deepak T. Pai, Senior Counsel at (202) 551-6876, or Michael W. Mundt, Senior Special Counsel, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Public Reference Desk, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549-0102, telephone (202) 551-5850.

### Applicants' Representations

1. The Trust is registered as an open-end management investment company and is organized as a Delaware trust authorized to issue multiple series. The Trust intends to offer and sell shares of one or more series (each an "Index Fund"), including the Market Vectors—Gold Miners ETF ("Initial Index Fund"). The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act") and will serve as the investment adviser to each Index Fund. In the future, the Adviser may enter into sub-advisory agreements with other investment advisers to act as "sub-advisers" with respect to particular Index Funds. Any sub-adviser will be registered under the Advisers Act or exempt from registration. The

Distributor, a broker-dealer registered under the Securities Exchange Act of 1934 (the "Exchange Act"), will serve as the principal underwriter and distributor for the Index Funds.

2. Each Index Fund will hold certain securities ("Portfolio Securities") selected to correspond generally to the price and yield performance, before fees and expenses, of a specified equity securities index (each an "Underlying Index"). No entity that creates, compiles, sponsors or maintains an Underlying Index is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust, the Adviser, the Distributor, promoter or any sub-adviser to an Index Fund. The Underlying Index for the Initial Index Fund is the Amex Gold Miners Index, a modified market capitalization weighted index comprised of publicly-traded companies involved primarily in mining for gold and silver. The Trust may offer additional Index Funds in the future based on other Underlying Indexes ("Future Index Funds"). Any Future Index Funds will (a) comply with the terms and conditions of any order granted pursuant to the application and (b) be advised by the Adviser.

3. The investment objective of each Index Fund will be to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of its Underlying Index. Intra-day values of the Underlying Index will be disseminated every 15 seconds throughout the trading day. An Index Fund will utilize either a "replication" or "representative sampling" strategy.<sup>1</sup> An Index Fund using a "replication" strategy will invest in substantially all of the Component Securities in its Underlying Index in approximately the same weightings as in the Underlying Index. In certain circumstances, such as when there are practical difficulties or substantial costs involved in holding every security in an Underlying Index or when a Component Security is illiquid, an Index Fund may use a "representative sampling" strategy pursuant to which it will invest in

<sup>1</sup> Applicants represent that the Index Fund will normally invest at least 95% of its total assets in the component securities that comprise its Underlying Index ("Component Securities"). Each Index Fund also may invest up to 5% of its assets in money market instruments or money market funds that comply with rule 2(a)(7) under the Act, in futures contracts, options, options on futures contracts, swap contracts, cash and cash equivalents, as well as in stocks not included in its Underlying Index, but which the Adviser believes will help the Index Fund track its Underlying Index.

some, but not all of the relevant Component Securities.<sup>2</sup> Applicants anticipate that an Index Fund that utilizes a "representative sampling" strategy will not track the performance of its Underlying Index with the same degree of accuracy as an investment vehicle that invests in every Component Security of the Underlying Index in the same weighting as the Underlying Index. Applicants expect that each Index Fund will have a tracking error relative to the performance of its Underlying Index of less than 5 percent.

4. Shares of the Index Funds will be sold at a price of between \$40 and \$50 per Share in Creation Units of 50,000 Shares. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into an agreement with the Trust and Distributor ("Authorized Participant"). An Authorized Participant must be either: (a) A broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission, or (b) a participant in the Depository Trust Company ("DTC"), and such participant, "DTC Participant"). Shares of each Index Fund generally will be sold in Creation Units in exchange for an in-kind deposit by the purchaser of a portfolio of securities designated by the Adviser to correspond generally to the price and yield performance, before fees and expenses, of the relevant Underlying Index (the "Deposit Securities"), together with the deposit of a relatively small specified cash payment ("Cash Component"). The Cash Component is generally an amount equal to the difference between (a) the net asset value ("NAV") (per Creation Unit) of the Index Fund and (b) the total aggregate market value (per Creation Unit) of the Deposit Securities.<sup>3</sup>

<sup>2</sup> Under the "representative sampling" strategy, the Adviser will seek to construct an Index Fund's portfolio so that its market capitalization, industry weightings, fundamental investment characteristics (such as return variability, earnings valuation and yield) and liquidity measures perform like those of the Underlying Index.

<sup>3</sup> The Trust will sell Creation Units of each Index Fund on any day that an Index Fund is open for business, including as required by section 22(e) of the Act (a "Business Day"). In addition to the list of names and amount of each security constituting the current Deposit Securities, it is intended that, on each Business Day, the Cash Component effective as of the previous Business Day, per outstanding Share of each Index Fund, will be made available. The Exchanges intend to disseminate, every 15 seconds, during their respective regular trading hours, through the facilities of the Consolidated Tape Association ("CTA"), an approximate amount per Share representing the sum of the estimated Cash Component effective through and including the previous Business Day,

Applicants state that in some circumstances it may not be practicable or convenient for an Index Fund to operate exclusively on an "in-kind" basis. The Trust reserves the right to permit, under certain circumstances, a purchaser of Creation Units to substitute cash in lieu of depositing some or all of the requisite Deposit Securities. An investor purchasing a Creation Unit from an Index Fund will be charged a fee ("Transaction Fee") to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Units.<sup>4</sup> The maximum Transaction Fees relevant to each Index Fund will be fully disclosed in the prospectus ("Prospectus") of such Index Fund or statement of additional information ("SAI"). All orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant and it will be the Distributor's responsibility to transmit such orders to the Trust. The Distributor also will be responsible for delivering the Prospectus to those persons purchasing Creation Units, and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the Trust to implement the delivery of Shares.

5. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed and traded on the American Stock Exchange, LLC, ("Amex"), another U.S. national securities exchange as defined in section 2(a)(26) of the Act, and Nasdaq Stock Market ("Nasdaq") (each, an "Exchange"). It is expected that one or more member firms of a listing Exchange will be designated to act as a specialist and maintain a market for Shares on the Exchange (the "Exchange Specialist"), or if Nasdaq is the listing Exchange, one or more member firms of Nasdaq will act as a market maker ("Market Maker") and maintain a market for Shares.<sup>5</sup> Prices of Shares

plus the current value of the Deposit Securities, on a per Share basis.

<sup>4</sup> Where an Index Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Securities, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Securities, including brokerage costs, and part or all of the spread between the expected bid and the offer side of the market relating to such Deposit Securities.

<sup>5</sup> If Shares are listed on the Nasdaq, no particular Market Maker will be contractually obligated to make a market in Shares, although Nasdaq's listing requirements stipulate that at least two Market Makers must be registered as Market Makers in Shares to maintain the listing. Registered Market

trading on an Exchange will be based on the current bid/offer market. Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

6. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Exchange Specialist, or Market Maker, in providing a fair and orderly secondary market for the Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.<sup>6</sup> Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

7. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from the Index Fund, or tender such Shares for redemption to the Index Fund, in Creation Units only. To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit generally will receive (a) a portfolio of securities designated to be delivered for Creation Unit redemptions on the date that the request for redemption is submitted ("Fund Securities"), which may not be identical to the Deposit Securities required to purchase Creation Units on that date, and (b) a "Cash Redemption Payment," consisting of an amount calculated in the same manner as the Cash Component, although the actual amount of the Cash Redemption Payment may differ from the Cash Component if the Fund Securities are not identical to the Deposit Securities on that day. An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a

Transaction Fee payable in connection with purchases of Creation Units.

8. Neither the Trust nor any individual Index Fund will be marketed or otherwise held out as an "open-end investment company" or a "mutual fund." Instead, each Fund will be marketed as an "exchange-traded fund," an "investment company," a "fund," or a "trust." All marketing materials that describe the method of obtaining, buying or selling Shares, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and that the owners of Shares may purchase or redeem Shares from the Index Fund in Creation Units only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

#### Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 24(d) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(f) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(f) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

#### Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an "open-end company" as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Trust to register as an open-end management investment company and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

#### Section 22(d) of the Act and Rule 22c-1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or

Makers are required to make a continuous, two-sided market at all times or be subject to regulatory sanctions.

<sup>6</sup> Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Shares.

preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Index Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

#### *Section 24(d) of the Act*

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company. Applicants seek relief from section 24(d) to permit dealers selling Shares to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>7</sup>

<sup>7</sup> Applicants state that they are not seeking relief from the prospectus delivery requirement for non-secondary market transactions, such as transactions in which an investor purchases Shares from the Trust or an underwriter. Applicants further state that the Prospectus will caution broker-dealers and others that some activities on their part, depending on the circumstances, may result in their being deemed statutory underwriters and subject them to the Prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it purchases Creation Units from an Index Fund, breaks them down into the constituent Shares, and sells those Shares directly to customers, or if it chooses to couple the creation of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. Each Index Fund's Prospectus will state that whether a person is an underwriter depends upon all of the facts and circumstances pertaining to that person's activities. Each Index Fund's Prospectus will caution dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary trading transactions), and thus dealing with Shares that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, that they would be unable to

8. Applicants state that Shares are bought and sold in the secondary market in the same manner as closed-end fund shares. Applicants note that transactions in closed-end fund shares are not subject to section 24(d), and thus closed-end fund shares are sold in the secondary market without a prospectus. Applicants contend that Shares likewise merit a reduction in the unnecessary compliance costs and regulatory burdens resulting from the imposition of the prospectus delivery obligations in the secondary market. Because Shares will be listed on an Exchange, prospective investors will have access to information about the product over and above what is normally available about an open-end security. Applicants state that information regarding market price and volume will be continually available on a real time basis throughout the day on brokers' computer screens and other electronic services. The previous day's price and volume information will be published daily in the financial section of newspapers. In addition, the Trust also intends to maintain a Web site that will include the Prospectus and SAI, the relevant Underlying Index for each Index Fund and additional quantitative information that is updated on a daily basis, including daily trading volume, closing price, the NAV for each Index Fund and information about the premiums and discounts at which the Index Fund's Shares have traded.

9. Applicants will arrange for broker-dealers selling Shares in the secondary market to provide purchasers with a product description ("Product Description") that describes, in plain English, the relevant Index Fund and the Shares it issues. Applicants state that a Product Description is not intended to substitute for a full Prospectus. Applicants state that the Product Description will be tailored to meet the information needs of investors purchasing Shares in the secondary market.

#### *Section 12(d)(1)*

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring

take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit management investment companies ("Investing Management Companies") and unit investment trusts ("Investing Trusts") registered under the Act that are not part of the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act, as the Trust to acquire shares of an Index Fund beyond the limits of section 12(d)(1)(A) and (B), (Investing Management Companies and Investing Trusts collectively, "Investing Funds"). Investing Funds exclude registered investment companies that are, or in the future may be, part of the same group of investment companies within the meaning of section 12(d)(1)(G)(ii) of the Act as the Index Funds. In addition, applicants seek relief to permit an Index Fund and the Distributor or any broker or dealer ("Broker") that is registered under the Exchange Act to knowingly sell shares of the Index Fund to an Investing Fund in excess of the limits of section 12(d)(1)(B). Applicants request that the relief sought apply to (a) Index Funds that are advised by the Adviser and in the same group of investment companies as the Trust, (b) each Investing Fund that enters into a participation agreement with the Index Fund ("Participation Agreement"), and (c) any Broker.<sup>8</sup>

12. Each Investing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the "Investing Fund Advisor") and may be advised by one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a "Subadviser"). Any investment adviser to an Investing Fund will be registered under the Advisers Act or exempt from registration. Each Investing Trust will be sponsored by a sponsor ("Sponsor").

<sup>8</sup> All parties that currently intend to rely on the requested relief from section 12(d)(1) are named as applicants. Any other party that relies on this relief in the future will comply with the terms and conditions of the application. An Investing Fund may rely on the requested order only to invest in the Index Funds and not in any other registered investment company.

13. Applicants submit that the proposed conditions to the relief requested adequately address the concerns underlying the limits in section 12(d)(1)(A) and (B), which include concerns about undue influence, excessive layering of fees and overly complex structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither the Investing Funds nor an Investing Fund Affiliate would be able to exert undue influence over the Index Funds.<sup>9</sup> To limit the control that an Investing Fund may have over an Index Fund, applicants propose a condition prohibiting an Investing Fund Advisor or a Sponsor, any person controlling, controlled by, or under common control with an Investing Fund Advisor or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by an Investing Fund Advisor or Sponsor, or any person controlling, controlled by, or under common control with an Investing Fund Advisor or Sponsor (“Investing Fund Advisor/Sponsor Group”) from controlling (individually or in the aggregate) an Index Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Subadviser, any person controlling, controlled by or under common control with the Subadviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by or under common control with the Subadviser (“Subadviser Group”). Applicants propose other conditions to limit the potential for undue influence over the Index Funds, including that no Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Index Fund) will cause an Index Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (“Affiliated Underwriting”). An “Underwriting Affiliate” is a principal underwriter in any underwriting or selling syndicate

<sup>9</sup> An “Investing Fund Affiliate” is an Investing Fund Advisor, Subadviser, Sponsor, promoter, and principal underwriter of an Investing Fund, and any person controlling, controlled by, or under common control with any of those entities.

that is an officer, director, member of an advisory board, Investing Fund Advisor, Subadviser, employee or Sponsor of an Investing Fund, or a person which any such officer, director, member of an advisory board, Investing Fund Advisor, Subadviser, employee, or Sponsor is an affiliated person (except any person whose relationship to the Index Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate.)

15. Applicants do not believe the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged to the Investing Management Company are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Index Fund in which the Investing Management Company may invest. In addition, an Investing Fund Advisor or a trustee or Sponsor of an Investing Trust will waive fees otherwise payable to it by the Investing Management Company or Investing Trust in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Index Fund under rule 12b-1 under the Act) received by the Investing Fund Advisor or trustee or Sponsor to the Investing Trust or an affiliated person of the Investing Fund Advisor, trustee or Sponsor, from the Index Funds in connection with the investment by the Investing Management Company or Investing Trust in the Index Fund. Applicants state that any sales loads or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds set forth in Conduct Rule 2830 of the NASD.

16. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Index Fund may acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by an exemptive order that allows the Index Fund to purchase shares of an affiliated money market fund for short-term cash management purposes. Applicants also represent that to ensure that Investing Funds comply with the terms and conditions of the requested relief from section 12(d)(1), any Investing Fund that intends to invest in an Index Fund in reliance on the requested order will be required to enter into a Participation Agreement

between the Index Fund and the Investing Fund. The Participation Agreement will require the Investing Fund to adhere to the terms and conditions of the requested order and participate in the proposed transactions in a manner that addresses concerns regarding the requested relief. The Participation Agreement also will include an acknowledgement from the Investing Fund that it may rely on the order only to invest in the Index Funds and not in any other investment company. The Participation Agreement will further require any Investing Fund that exceeds the 5% or 10% limitations in section 12(d)(1)(A)(ii) and (iii) to disclose in its prospectus that it may invest in Index Funds, and to disclose, in “plain English,” in its prospectus the unique characteristics of the Investing Funds investing in Index Funds, including but not limited to the expense structure and any additional expenses of investing in Index Funds.

#### *Section 17(a)(1) and (2) of the Act*

17. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of such company. Section 2(a)(3) of the Act defines an affiliated person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by the other person and (c) any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person’s voting securities. Applicants state that if Creation Units of an Index Fund are held by twenty or fewer investors, including an Exchange Specialist or Market Maker, some or all of such investors will be 5% owners of the Index Fund, and one or more investors may hold in excess of 25% of the Index Fund. Such investors would be deemed to be affiliates of the Index Fund.

18. Applicants request an exemption from section 17(a) of the Act pursuant to sections 17(b) and 6(c) of the Act to permit any persons that are affiliated persons of the Index Funds solely by virtue of (a) holding 5% or more, or in excess of 25% of the outstanding Shares of the Trust or one or more Index Funds (and affiliated persons of such persons so long as they are not otherwise

affiliated with the Trust or the Index Funds) or (b) holding 5% or more of one or more other registered investment companies (or series thereof) advised by the Adviser, or holding in excess of 25% of the outstanding shares of such registered investment company (or series thereof), to effectuate purchases and redemptions in-kind.

19. Applicants assert that no useful purpose would be served by prohibiting these types of affiliated persons from purchasing or redeeming Creation Units through "in-kind" transactions. The deposit procedures for both in-kind purchases and in-kind redemptions of Creation Units will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued in the same manner as Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons of an Index Fund, or the affiliated persons of such affiliated persons, described above, to effect a transaction detrimental to other holders of Shares. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Index Fund.

20. Applicants also seek relief from section 17(a) to permit an Index Fund that is an affiliated person of an Investing Fund because the Investing Fund holds 5% or more of the Index Fund's Shares to sell its Shares to and redeem its Shares from an Investing Fund.<sup>10</sup> Applicants believe that any proposed transactions directly between Index Funds and Investing Funds will be consistent with the policies of each Investing Fund. The purchase of Creation Units by an Investing Fund directly from an Index Fund will be accomplished in accordance with the investment restrictions of any such Investing Fund and will be consistent with the investment policies set forth in the Investing Fund's registration statement. The Participation Agreement will require any Investing Fund that purchases Creation Units directly from an Index Fund to represent that the purchase of Creation Units from an Index Fund by an Investing Fund will be accomplished in compliance with the investment restrictions of the Investing Fund and will be consistent with the

investment policies set forth in the Investing Fund's registration statement.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief to permit the operations of the Index Funds will be subject to the following conditions:

1. Applicants will not register a Future Index Fund of the Trust by means of filing a post-effective amendment to the Trust's registration statement or by any other means, unless: (a) applicants have requested and received with respect to such Future Index Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission; or (b) the Future Index Fund will be listed on an Exchange without the need for a filing pursuant to rule 19b-4 under the Exchange Act.

2. Each Index Fund's Prospectus and Product Description will clearly disclose that, for purposes of the Act, Shares are issued by the Index Fund and that the acquisition of Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in an Index Fund beyond the limits of section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a Participation Agreement with the Trust regarding the terms of the investment.

3. As long as a Trust operates in reliance on the requested order, the Shares will be listed on an Exchange.

4. Neither the Trust nor any Index Fund will be advertised or marketed as an open-end fund or a mutual fund. Each Index Fund's Prospectus will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from the Index Fund and tender those shares for redemption to the Index Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable, and that owners of Shares may purchase those Shares from the Index Fund and tender those Shares for redemption to the Index Fund in Creation Units only.

5. The Web site for the Trust, which will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each Index Fund: (a) The prior business day's NAV and the reported closing price, and a calculation of the premium or discount

of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition the Product Description for the Index Fund will state that the website for the Trust has information about the premiums and discounts at which Shares have traded.

6. The Prospectus and annual report for each Index Fund also will include: (a) The information listed in condition 5(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one, five and ten year periods (or life of the Index Fund): (i) the cumulative total return and the average annual total return based on NAV and closing price, and (ii) the cumulative total return of the relevant Underlying Index.

7. Before an Index Fund may rely on the order, the Commission will have approved, pursuant to rule 19b-4 under the Exchange Act, an Exchange rule requiring Exchange members and member organizations effecting transactions in Shares to deliver a Product Description to purchasers of Shares.

The Applicants agree that any order of the Commission granting the requested relief from section 12(d)(1) will be subject to the following conditions:

8. The members of an Investing Fund Advisor/Sponsor Group will not control (individually or in the aggregate) an Index Fund within the meaning of section 2(a)(9) of the Act. The members of the Subadviser Group will not control (individually or in the aggregate) an Index Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Index Fund, an Investing Fund Advisor/Sponsor Group or Subadviser Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of an Index Fund, it will vote its shares of the Index Fund in the same proportion as the vote of all other holders of the Index Fund's shares. This condition does not apply to the Subadviser Group with respect to an Index Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

<sup>10</sup> Applicants believe that an Investing Fund will purchase Shares in the secondary market and will not purchase or redeem Creation Units directly from an Index Fund. Nonetheless, an Investing Fund that owns 5% or more of an Index Fund could seek to transact in Creation Units directly with an Index Fund pursuant to the section 17(a) relief requested.

9. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in an Index Fund to influence the terms of any services or transactions between the Investing Fund or Investing Fund Affiliate and the Index Fund or Index Fund Affiliate.

10. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to assure that the Investing Fund Advisor and Subadviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from an Index Fund or an Index Fund Affiliate in connection with any services or transactions.

11. Once an investment by an Investing Fund in the securities of an Index Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors/trustees of the Index Fund ("Board"), including a majority of the disinterested Board members, will determine that any consideration paid by the Index Fund to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Index Fund; (b) is within the range of consideration that the Index Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Index Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

12. An Investing Fund Advisor or a trustee or Sponsor of an Investing Trust will waive fees otherwise payable to it by the Investing Management Company or Investing Trust in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Index Fund under rule 12b-1 under the Act) received from an Index Fund by the Investing Fund Advisor or trustee or Sponsor to the Investing Trust or an affiliated person of the Investing Fund Advisor, trustee or Sponsor, other than any advisory fees paid to the Investing Fund Advisor or trustee or Sponsor, or an affiliated person of the Investing Fund Advisor, trustee or Sponsor by the Index Fund in connection with the investment by the

Investing Management Company or Investing Trust in the Index Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from an Index Fund by the Subadviser, or an affiliated person of the Subadviser, other than any advisory fees paid to the Subadviser or its affiliated person by the Index Fund, in connection with the investment by the Investing Management Company in the Index Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

13. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Index Fund) will cause an Index Fund to purchase a security in any Affiliated Underwriting.

14. The Board, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by an Index Fund in an Affiliated Underwriting once an investment by the Investing Fund in the securities of the Index Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Index Fund. The Board will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Index Fund; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performances of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Index Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

15. The Index Fund will maintain and preserve permanently in an easily accessible place a written copy of the

procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by an Investing Fund in securities of the Index Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

16. Before investing in an Index Fund in excess of the limits in section 12(d)(1)(A), the Investing Fund and the Index Fund will execute a Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers, and the trustee and Sponsor of an Investing Trust, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Index Fund in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Index Fund of the investment. At such time, the Investing Fund will also transmit to the Index Fund a list of names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Index Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The Index Fund and the Investing Fund will maintain and preserve a copy of the order, the agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

17. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Index Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.



18. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in Conduct Rule 2830 of the NASD.

19. No Index Fund will acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by an exemptive order that allows the Index Fund to purchase shares of an affiliated money market fund for short-term cash management purposes.

20. The board of directors or trustees of any Investing Management Company and any Index Fund will satisfy the fund governance standards as defined in rule 0-1(a)(7) under the Act by the later of (a) the compliance date of the rule or (b) the date on which the Investing Management Company and Index Fund execute a Participation Agreement.

For the Commission, by the Division of Investment Management, under delegated authority.

**Nancy M. Morris,**  
Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-53607; File No. SR-BSE-2006-05]

**Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change To Modify the Boston Options Exchange's Fee Schedule To Impose Surcharge Fees for Transactions in Options on ETFs on a Retroactive Basis**

April 6, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 15, 2006, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the BSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The BSE is proposing to retroactively establish certain Boston Options Exchange ("BOX") licensing fee surcharges applicable to broker-dealer proprietary accounts and market maker accounts for trades in options on certain exchange traded funds ("ETFs"). The Exchange is proposing to apply these surcharge fees retroactively for each product as of the Effective Dates listed in Table 1, below, through January 3, 2006. On January 4, 2006, the Exchange filed an identical amendment to the BOX Fee Schedule,<sup>3</sup> which became immediately effective under section 19(b)(3)(A) of the Act.<sup>4</sup> Because the

Exchange seeks to apply the surcharge fees listed in the BOX Fee Schedule on a retroactive basis, the Exchange is submitting this proposal to the Commission pursuant to section 19b(2) of the Act<sup>5</sup> to be published for notice and comment. The current BOX Fee Schedule is available on the BOX Web site at <http://www.bostonoptions.com>. The text of the proposed rule change is available on the BOX's Web site, at the principal office of BOX, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the BSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The BSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

**1. Purpose**

The Exchange is proposing to amend BOX's Fee Schedule to retroactively establish, from the Effective Dates listed in Table 1 below through January 3, 2006, a surcharge fee for certain transactions in ETF options on BOX that are affected by market makers and broker-dealer proprietary accounts.<sup>6</sup> The respective surcharge fees became effective on January 4, 2006 pursuant to a previous proposed rule change submitted by the Exchange.<sup>7</sup>

Name	Symbol	Fee	Effective date
Standard & Poor's Depository Receipts .....	SPY .....	\$0.10	1/10/05
iShares Russell 2000 Index Fund .....	IWM .....	0.10	5/2/05
S&P Energy Select Sector SPDR Fund .....	XLE .....	0.09	6/6/05
iShares Russell 2000 Growth Index Fund .....	IWO .....	0.10	6/27/05
iShares Nasdaq Biotechnology Index Fund .....	IBB .....	0.10	6/27/05
S&P Financial Select Sector SPDR Fund .....	XLF .....	0.09	6/27/05

The BOX Fee Schedule that was in effect when these products started trading (*i.e.*, on the Effective Dates

specified in Table 1 above), stated in section 2(c) that applicable surcharges applied for options on ETFs that are

passed-through by BOX.<sup>8</sup> However, in an administrative oversight, the BSE did not update the list of ETF products that

<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. 53454 (March 8, 2006), 71 FR 13439 (March 15, 2006) (SR-BSE-2006-01).

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> The surcharge fee for trading in the options listed in Section 2(c) of the BOX Fee Schedule is equal to the cost charged to BOX by the licensor in the associated licensing agreement. BSE represents these fees are only charged to BOX Participants.

<sup>7</sup> See *supra* note 3.

<sup>8</sup> Section 2(c) of the BOX Fee Schedule then stated, as it currently does: "Plus, where applicable, any surcharge for options on ETFs that are passed through by BOX."