

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55953; File No. SR-NYSE-2007-46)

June 25, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Shares of the HealthShares™ Orthopedic Repair Exchange-Traded Fund

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> notice is hereby given that on May 21, 2007, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared substantially by NYSE. On May 31, 2007, NYSE filed Amendment No. 1 to the proposed rule change. This order provides notice of the proposed rule change, as amended, and approves the proposed rule change on an accelerated basis.

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

The Exchange proposes to list and trade shares of the HealthShares™ Orthopedic Repair Exchange-Traded Fund (the “Fund”).<sup>3</sup> The text of the proposal is available at NYSE, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 Exchange 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

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

<sup>2</sup> 17 CFR 240.19b-4.

in Item IV below, and the most significant aspects of such statements are set forth in Sections A, B, and C below.

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

1. Purpose

The Exchange proposes to list and trade the shares of the Fund (the “Shares”), which are Investment Company Units, as such term is defined in Section 703.16 of the NYSE Listed Company Manual.<sup>4</sup> The Fund can invest in both U.S. securities and non-U.S. securities not listed on a national securities exchange.<sup>5</sup> Although Section 703.16 of the NYSE Listed Company Manual permits the Exchange to either originally list and trade Investment Company Units or trade Investment Company Units pursuant to unlisted trading privileges,<sup>6</sup> the Fund Shares do not meet the “generic” listing requirements of Section 703.16 of the NYSE Listed

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<sup>3</sup> The Fund is registered under the Investment Company Act of 1940 (the “1940 Act”).

<sup>4</sup> Section 703.16 of the NYSE Listed Company Manual defines an Investment Company Unit as a security that represents an interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company, or a similar entity.

<sup>5</sup> The Exchange represents that, as of May 7, 2007, all stocks underlying the Index (as defined herein) were listed on a national securities exchange (NYSE or The Nasdaq Stock Market LLC); however, as noted above, any changes to the Index may include non-U.S. stocks not listed on a national securities exchange.

<sup>6</sup> See Securities Exchange Act Release Nos. 55113 (January 17, 2007), 72 FR 3179 (January 24, 2007) (SR-NYSE-2006-101) (approving amendments to generic listing standards for series of Investment Company Units that are based on international or global indexes, or on indexes described in rules previously approved by the Commission); 43679 (December 5, 2000), 65 FR 77949 (December 13, 2000) (SR-NYSE-00-46) (approving generic listing standards to permit the listing and trading of Investment Company Units under Rule 19b-4(e) under the Act); and 36923 (March 5, 1996), 61 FR 10410 (March 13, 1996) (SR-NYSE-95-23) (approving the original listing standards for units of trading that represent interests in a registered investment company that would be organized either as an open-end management investment company or as a unit investment trust).

Company Manual (permitting listing in reliance upon Rule 19b-4(e)<sup>7</sup> under the Act) because the Index (as defined herein) underlying the Fund does not meet the initial listing requirements of Section 703.16(C)(2)(b)(ii) of the Listed Company Manual.<sup>8</sup> Therefore, NYSE has filed the instant proposed rule change to obtain Commission approval to list and trade the Shares on the Exchange pursuant to Section 19(b)(2) of the Act<sup>9</sup> and Rule 19b-4 thereunder.<sup>10</sup>

The Fund will be based on the HealthShares™ Orthopedic Repair Index, (“Underlying Index” or “Index”).<sup>11</sup> XShares Advisors, LLC is the investment adviser (the “Advisor”) to the Fund.<sup>12</sup> BNY Investment Advisors (the “Sub-Advisor”) acts as the investment sub-advisor to the Fund. The Sub-Advisor is registered under the Advisers Act and is responsible for the day-to

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<sup>7</sup> 17 CFR 240.19b-4(e).

<sup>8</sup> Section 703.16(C)(2)(b)(ii) of the NYSE Listed Company Manual requires that, upon the initial listing of any series of Investment Company Units, the component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each must have minimum worldwide trading volume during each of the last six months of at least 250,000 shares. The Exchange represents that Index component stocks each having a worldwide monthly trading volume of at least 250,000 shares in the aggregate account for approximately 86.2% of the weight of the Index during each month from November 2006 through April 2007. Because such percentage misses the minimum required threshold by approximately 3.8%, the Shares cannot be listed and traded pursuant to Section 703.16 of the NYSE Listed Company Manual. The Exchange represents that the Fund Shares otherwise meet all of the other “generic” listing standards under Section 703.16 of the NYSE Listed Company Manual. Telephone conversation between Michael Cavalier, Assistant General Counsel, NYSE, and Edward Cho, Special Counsel, Division of Market Regulation (“Division”), Commission, on June 21, 2007 (“June 21 Confirmation”).

<sup>9</sup> 15 U.S.C. 78s(b)(1).

<sup>10</sup> 17 CFR 240.19b-4.

<sup>11</sup> HealthShares™, Inc. (the “Corporation”) is an open-end management company with twenty other series of underlying fund portfolios that offer shares known as HealthShares™ which are similar to the Shares and are currently listed and trading on the Exchange.

<sup>12</sup> The Advisor is registered as an “investment adviser” under Section 203 of the Investment Advisers Act of 1940 (the “Advisers Act”). See 15 U.S.C. 80b-3.

day management of the Fund's portfolio, which involves principally reconfiguring the portfolio of the Fund, typically quarterly, to reflect any reconfiguration in the Underlying Index for the Fund by the Index Administrator (as defined herein). While the Fund is managed by the Advisor or Sub-Advisor, the Corporation's Board of Directors has overall responsibility for the Fund's operations. Standard and Poor's, a division of The McGraw Hill Companies, Inc., is the index administrator (the "Index Administrator") for the Index. The Index Administrator is responsible for maintaining the Index as described below.<sup>13</sup> ALPS Distributors, Inc. is a registered broker-dealer and acts as distributor and underwriter (the "Distributor") of the Creation Units (as defined herein) of the Shares.<sup>14</sup> The Distributor distributes the Shares on an agency basis.

Description of the Underlying Index and the Fund. The Exchange states that the Underlying Index uses a patent-pending investment approach known as "Vertical Investing." Vertical Investing seeks to categorize companies within a particular healthcare, life sciences, or biotechnology index by focusing on each company's business activities with regard to the diagnosis of diseases, the developments of drugs, treatments, therapies, delivery systems, and the development of enabling/research tools and technologies for use in the healthcare, life sciences, or biotechnology sectors. The Underlying Index for the Fund has been designed around verticals in the area of orthopedic repair.

Based on its own proprietary intellectual model, the Index uses established specific, defined characterization/inclusion/exclusion criteria (the "Index Methodology") that an issuer

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<sup>13</sup> S&P is neither a registered broker-dealer nor an "affiliated person," as defined in Section 2(a)(3) of the 1940 Act, or an affiliated person of an affiliated person of the Fund, Advisor, Sub-Advisor, Distributor (as defined herein), or the Corporation. See 15 U.S.C. 80a-2(a)(3).

<sup>14</sup> The Exchange represents that the Distributor is not an "affiliated person" of the Advisor, the Sub-Advisor, the Fund, or the Corporation.

must meet in order to be included in the Underlying Index. The Index Administrator employs the Index Methodology to determine the composition of the Underlying Index. When determining the composition of the Underlying Index, the Index Administrator relies on many sources of information, including information obtained from the BioCentury and MedTrack databases. The BioCentury and MedTrack databases are independent, generally available databases that provide a vast amount of data for healthcare, life sciences, and biotechnology companies, including information regarding products, clinical trials, pipeline development, patent, and other information. The Index Methodology is publicly available on the Fund's Web site at [www.healthsharesinc.com](http://www.healthsharesinc.com). Any change to the Index Methodology will be posted on the Fund's Web site at least 60 days prior to implementation of such change. For the equity components underlying the Index, the market capitalization range is generally from \$100 million to \$20 billion. Typically, the largest of these companies (determined by market capitalization) are included in the Index, with a minimum of 22 companies in the Index.<sup>15</sup> The initial companies selected for inclusion are weighted equally at inception and are thereafter weighted based upon the individual company's market value relative to the overall market value of the Index (i.e., price weighted). Maximum weighting for any security in the Index is typically 15%. When a company's weighting exceeds 15% of the Index, the Index Administrator will reduce

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<sup>15</sup> The Exchange states that, as of May 7, 2007, the Index had a total market capitalization of approximately \$52.2 billion. The average total market capitalization was approximately \$2.4 billion. The Index's top three holdings were Zimmer Holdings, Smith & Nephew PLC (ADR), and DENTSPLY International. The ten largest constituents by market capitalization represented approximately 52.2% of the Index weight. The five highest weighted stocks, which represented 34.1% of the Index weight, had an average daily trading volume in excess of 7.3 million shares during the period November 2006 through April 2007. 86.2% of the Index had worldwide monthly trading volume of 250,000 shares during each of the last 6 months (November 2006 through April 2007). The average monthly trading volume for the Index stocks over the last 6 months was 145.5 million shares.

such company's weighting to 10%, with the 5% "excess" applied equally to all remaining component securities in the Underlying Index. Minimum weighting for a security in the Index is 2.5%. If a security's weighting falls below 2.5%, the Index Administrator will increase the security's weighting to its initial weighting or 5%, whichever is less, with the required increment taken equally from all the remaining component securities. Information about the Index, including the component securities in the Index and value of the securities in the Index are posted throughout the trading day at least every 15 seconds and are available through Reuters, a market data vendor.

The Fund's overall investment objective is to track the performance, before fees and expenses, of the Index. The Adviser uses a passive, or indexing, approach in managing the Fund. The Fund will invest at least 90% of its assets in the common stocks of companies in the Index, or in American Depositary Receipts ("ADRs") or Global Depositary Receipts ("GDRs") based on securities of international companies in the Index. Because the Index is comprised only of stocks as indicated by its name (i.e., only companies associated with the orthopedic repair business are contained in the Index), the Fund will invest at least 90% of its assets in such companies. The Fund will provide shareholders with at least 60 days' notice of any change in these policies. The Fund may also invest up to 10% of its assets in futures contracts, options on futures contracts, options, swaps on securities of companies in the Index, as well as cash and cash equivalents, such as money market instruments (subject to applicable limitations of the 1940 Act). The Fund will attempt to replicate the Index by matching the weighting of securities in its portfolio with such securities' weightings in the Index. In managing the Fund, the Advisor seeks a correlation of 0.95 or better between the Fund's performance and the performance of its Underlying Index. A figure of 1.00 would mean perfect correlation.

From time to time, it may not be possible, for regulatory or other legal reasons, to replicate the Index, and in such cases, the Advisor may pursue a sampling strategy in managing the portfolio. Pursuant to this strategy, the Fund may invest the remainder of its assets in securities of companies not included in the Index if the Advisor believes that such securities will assist the Fund in tracking the Index. If the Fund pursues a sampling strategy, it will continue to invest at least 90% of its assets in the common stocks, ADRs, or GDRs of the companies in the Index.

Transaction expenses, including operational processing and brokerage costs, will be incurred by the Fund when investors purchase or redeem Creation Units “in-kind” and such costs have the potential to dilute the interests of the Fund’s existing shareholders. Hence, the Fund will impose purchase or redemption transaction fees (“Transaction Fees”) in connection with effecting such purchases or redemptions. The exact amounts of such Transaction Fees will be determined separately for the Fund and described in the Fund’s Prospectus.

Creations and Redemptions. The Fund will continuously issue its Shares in one or more groups of a fixed number of Shares (i.e., 100,000 Shares). Each such group of Shares is called a “Creation Unit,” and such fixed number will be set forth in the Prospectus for the Fund. The initial price per Share of the Fund is expected to be approximately \$25. Accordingly, the initial price of a Creation Unit would be approximately \$2,500,000.<sup>16</sup>

All orders to purchase Shares in Creation Units must be placed with the Distributor by or through a “Participating Organization” which has entered into a participant agreement with the Distributor and is either (1) a “Participating Party,” i.e., a broker-dealer or other participant in

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<sup>16</sup> June 21 Confirmation.

the Continuous Net Settlement System of the National Securities Clearing Corporation (the “Clearing Process”), a clearing agency registered with the Commission, or (2) a participant in the Depository Trust Company (“DTC”). A Participating Organization is not required to be a member of an exchange.

Payment with respect to Creation Units placed through the Distributor will be made by the purchasers generally by an “in-kind” deposit with the Corporation of a basket of stocks that are part of the Fund’s Underlying Index (“Deposit Securities”) together with an amount of cash specified by the Advisor or the Sub-Advisor in the manner described below (the “Balancing Amount”).<sup>17</sup> The deposit of the requisite Deposit Securities, the Balancing Amount, and any Transaction Fees are collectively referred to herein as a “Portfolio Deposit.”

The Advisor will make available on each business day at [www.healthsharesinc.com](http://www.healthsharesinc.com),<sup>18</sup> prior to the opening of trading on the Exchange, the list of the names and the required number of shares of each Deposit Security included in the current Portfolio Deposit (based on information at the end of the previous business day) for the Fund (the “Creation List”). Such Portfolio Deposit will be applicable, subject to any adjustments to the Balancing Amount, as described below, in order to effect purchases of Creation Units of the Fund until such time as the next-announced Portfolio Deposit composition is made available. The Advisor also will make available on each business day, prior to the opening of trading on the Exchange, the list of

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<sup>17</sup> The Balancing Amount is an amount equal to the difference between (1) the net asset value (“NAV”) per Creation Unit of the Fund and (2) the total aggregate market value per Creation Unit of the Deposit Securities (such value referred to herein as the “Deposit Amount”). With respect to purchases of Creation Units, the Balancing Amount serves the function of compensating for differences, if any, between the NAV per Creation Unit and the Deposit Amount.

<sup>18</sup> Telephone conversation between Michael Cavalier, Assistant General Counsel, NYSE, and Edward Cho, Special Counsel, Division, Commission, on May 30, 2007.

securities in the Fund's portfolio holdings that an investor who tenders a Creation Unit will receive as redemption proceeds ("Redemption Securities"). This list is referred to as the "Redemption List," as discussed below. The Creation List, Redemption List, Balancing Amount, and the Cash Redemption Payment (as defined herein), each as created by the Sub-Advisor, also are made available to Participating Parties upon request through the facilities of the Clearing Process.

The identity and number of shares of the Deposit Securities required for the Portfolio Deposit for the Fund will change as re-balancing adjustments and corporate action events are reflected from time to time by the Advisor or the Sub-Advisor with a view to the investment objective of the Fund. The composition of the Deposit Securities may also change in response to adjustments to the weighting or composition of the component securities in the Index. The adjustments described above also will reflect changes in the composition of the Index resulting from stock splits and other corporate actions.

In addition, the Corporation reserves the right with respect to the Fund to permit or require the substitution of an amount of cash (i.e., a "cash in lieu" amount) to be added to the Balancing Amount to replace any Deposit Security which: (1) may be unavailable or not available in sufficient quantity for delivery to the Corporation upon the purchase of Shares in Creation Units; (2) may not be eligible for transfer through the Clearing Process; or (3) may not be eligible for trading by a Participating Organization or the investor on whose behalf the Participating Organization is acting. When such cash purchases of Creation Units are available or specified for the Fund, such purchases would occur in essentially the same manner as "in-kind" purchases of the Shares. In the case of a cash purchase, the investor must pay the cash equivalent of the Deposit Securities it would otherwise be required to provide through an "in-

kind” purchase, plus the same Balancing Amount required to be paid by an “in-kind” purchaser. In addition, trading costs, operational processing costs, and brokerage commissions associated with using cash to purchase the requisite Deposit Securities will be incurred by the Fund and will affect the value of all Shares. Hence the Advisor, subject to the approval of the Board of Directors of the Corporation, may adjust the relevant Transaction Fee to defray any such costs and prevent shareholder dilution within specified parameters.

The Participating Organization must make available on or before the contractual settlement date by means satisfactory to the Corporation immediately-available or same-day funds estimated by the Corporation to be sufficient to pay the Balancing Amount next determined after acceptance of the purchase order, together with the applicable Transaction Fee. Any excess funds would be returned following settlement of the Creation Unit purchase.

Once the Corporation has accepted an order, upon the next determination of the NAV per Share of the Fund, the Corporation will confirm the issuance, against receipt of payment, of a Creation Unit of the Fund at such NAV. The Distributor would then transmit a confirmation of acceptance to the Participating Organization that placed the order. A Creation Unit would not be issued until the transfer of good title to the Corporation of the Deposit Securities and the payment of the Balancing Amount have been completed (subject to certain exceptions).

Beneficial owners may sell their Shares in the secondary market, but must accumulate enough Shares to constitute a Creation Unit in order to redeem through a Participating Organization. Redemption orders must be placed by or through a Participating Organization. Creation Units will be redeemable at their NAV per Share next determined after receipt of a request for redemption by the Corporation. The Corporation has the right to make redemption payments in respect of the Fund in cash, “in-kind,” or a combination of both, provided the value

of its redemption payments on a Creation Unit basis equals the NAV, times the appropriate number of Shares of the Fund. The Corporation currently contemplates that Creation Units of the Fund will be redeemed principally “in-kind” (together with a balancing cash payment), except in certain circumstances.

In some instances, the Creation List may differ slightly from the Redemption List. The Corporation will also deliver to the redeeming Beneficial Owner in cash the “Cash Redemption Payment,” which on any given business day will be an amount calculated in the same manner as that for the Balancing Amount, although the actual amounts may differ if the Redemption List is not identical to the Creation List applicable for purchases on the same day. To the extent that the Redemption Securities on the Redemption List have a value greater than the NAV of the Shares being redeemed, a cash payment equal to the difference is required to be paid by the redeeming party to the Corporation. The Corporation may also make redemptions in cash in lieu of transferring one or more Redemption Securities to a redeemer if the Corporation determines, in its discretion, that such method is warranted. This could occur, for example, when a redeeming entity is restrained by regulation or policy from transacting in certain Redemption Securities, such as the presence of such Redemption Securities on a redeeming investment banking firm’s restricted list.

Redemption of Shares in Creation Units will be subject to a Transaction Fee imposed in the same amount and manner as the Transaction Fee incurred in purchasing such Shares. Redemption of Shares may be made either through the Clearing Process or through the facilities of DTC.

Dividends and Distributions. Dividends from net investment income will be declared and paid at least annually by the Fund in the same manner as by other open-end investment

companies. Dividends will be paid to beneficial owners of record in the manner described below. Distributions of realized capital gains, if any, generally will be declared and paid once a year, but the Fund may make distributions on a more frequent basis to comply with certain distribution requirements.

Dividends and other distributions on the Shares will be distributed on a pro rata basis to beneficial owners of such Shares. Dividend payments will be made through the DTC and the DTC Participants to beneficial owners on the record date with amounts received from the Fund.<sup>19</sup>

Shareholder Reports. The Corporation will furnish to the DTC participants for distribution to beneficial owners of Shares of the Fund notifications with respect to each distribution, as well as an annual notification as to the tax status of the Fund's distributions. The Corporation will also furnish to the DTC participants for distribution to beneficial owners of the Shares the Corporation's annual report containing audited financial statements, as well as copies of annual and semi-annual shareholder reports.

Availability of Information Regarding the Shares and Underlying Index. The Exchange, through the facilities of the Consolidated Tape Association or a major market data vendor, will disseminate at least every 15 seconds during Exchange trading hours an amount per Share representing the sum of (1) the estimated Balancing Amount and (2) the current value of the Deposit Securities, on a per-Share basis. This amount is referred to herein as the Intraday Indicative Value ("IIV"). In addition, the value of the Underlying Index will be updated intra-

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<sup>19</sup> The Exchange states that the Corporation will not make the DTC book-entry dividend reinvestment service available for use by beneficial owners for reinvestment of their cash proceeds, but certain individual brokers may make a dividend reinvestment service available to their clients. The Corporation's disclosure documents will inform investors of this fact and direct interested investors to contact their brokers to ascertain the availability and a description of such a service through such brokers.

day on a real-time basis as individual component securities change in price and will be disseminated at least every 15 seconds during Exchange trading hours by one or more major market data vendors. The value for the Underlying Index also will be disseminated by one or more major market data vendors once each trading day based on closing prices in the relevant exchange market.

If the Index includes non-U.S. stocks not listed on a national securities exchange, there may be an overlap in trading hours between the foreign and U.S. markets with respect to the Fund. In such a case, the applicable IIV would be updated at least every 15 seconds to reflect price changes in the applicable foreign market or markets, with such prices converted into U.S. dollars based on the currency exchange rate. When the foreign market or markets are closed and U.S. markets are open, the IIV would be updated at least every 15 seconds to reflect changes in currency exchange rates after the foreign market closes. The IIV will also include the applicable cash component for the Fund.

The NAV for the Fund will be calculated by BNY Asset Management between 4:30 p.m. and 6:30 p.m. Eastern Time (“ET”) each trading day, and, once calculated, BNY Asset Management and the Fund will disseminate the NAV so that it is available to all market participants at the same time.<sup>20</sup> The updated NAV will be available on the Corporation’s Web site at the same time that the NAV is made available to other market participants. The Corporation’s Web site will also include: (1) the Fund’s Prospectus and Statement of Additional Information; (2) information regarding the Index; (3) the prior business day’s NAV; (4) the mid-

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<sup>20</sup> The Exchange represents that if the NAV is not disseminated to all market participants at the same time, the Exchange will halt trading in the Fund Shares.

point of the bid-ask spread at the time of calculation of the NAV (the “Bid-Ask Price”);<sup>21</sup> (5) a calculation of the premium or discount to the Bid-Ask Price at the time of calculation of the NAV against such NAV; (6) the component securities of the Index; and (7) a description of the methodology used in the foregoing computations (including weighting and number of Shares held).

The Exchange states that the closing prices of the Fund’s Deposit Securities are readily available from, as applicable, the relevant exchange, automated quotation systems, and published or other public sources or on-line information services that are major market data vendors, such as Quotron, Bloomberg, or Reuters. Similarly, information regarding market, prices, and volume of the Shares will be broadly available on a real-time basis throughout the trading day. The previous day’s closing price and volume information for the Shares will be published daily in the financial sections of many newspapers.

Trading Rules and Criteria for Initial and Continued Listing. The Fund Shares will trade as equity securities and will therefore be subject to the Exchange rules governing the trading of equity securities.<sup>22</sup> The Shares will trade on the Exchange from 9:30 a.m. until 4:15 p.m. ET. The minimum price variation for quoting will be \$.01.

Although the Fund does not meet the initial listing requirements of Section 703.16(C)(2)(b) of the NYSE Listed Company Manual, the Exchange represents that the Fund will be subject to the criteria for continued listing of Investment Company Units under Section

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<sup>21</sup> The Bid-Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange on which the Shares are listed for trading.

<sup>22</sup> E-mail from Michael Cavalier, Assistant General Counsel, NYSE, to Edward Cho, Special Counsel, Division, Commission, dated June 4, 2007 (confirming the Exchange rules that would govern the trading of the Shares).

703.16(H) of the NYSE Listed Company Manual.<sup>23</sup> A minimum of one Creation Unit (100,000 shares) will be required to be outstanding at the start of trading. This minimum number of Shares of the Fund required to be outstanding at the start of trading will be comparable to requirements that have been applied to previously traded series of Investment Company Units.

Information Memo. The Exchange will distribute an Information Memo (“Memo”) to its members in connection with the trading of the Shares of the Fund. The Memo will discuss the special characteristics and risks of trading this type of security. In addition, the Memo, among other things, will discuss what the Fund is, how the Fund’s shares are created and redeemed, the requirement that members and member firms deliver a prospectus or product description to investors purchasing shares of the Fund prior to or concurrently with the confirmation of a transaction (referring members and member organizations to NYSE Rule 1100(b)),<sup>24</sup> the applicable Exchange rules, dissemination information, trading information, and the applicable suitability rules (including NYSE Rule 405).<sup>25</sup> The Memo will also discuss exemptive, no-action, and interpretive relief granted by the Commission from Section 11(d)(1) and certain other

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<sup>23</sup> June 21 Confirmation.

<sup>24</sup> The Exchange states that the Commission has granted the Corporation an exemption from certain prospectus delivery requirements under Section 24(d) of the 1940 Act. See Investment Company Act of 1940 Release No. 27594 (December 7, 2006), 2006 SEC LEXIS 2920 (December 15, 2006) (812-13264) (“Exemptive Order”). The Exchange further states that any product description used in reliance on the Exemptive Order would comply with all representations made therein and all conditions thereto. The Memo will advise members and member organizations that delivery of a prospectus to customers in lieu of a product description would satisfy the requirements of NYSE Rule 1100(b), which sets forth certain product description delivery requirements that apply only to a series of Investment Company Units as to which the sponsor or other appropriate party has obtained an exemption from Section 24(d) of the 1940 Act.

<sup>25</sup> Specifically, the Memo to members will note that, before an Exchange member, member organization, or employee thereof recommends a transaction in Fund Shares, a determination must be made that the recommendation is in compliance with all

rules under the Act, if applicable.

Trading Halts. In order to halt the trading of the Shares, the Exchange may consider, among other things, factors such as the extent to which trading is not occurring in an underlying security(ies) and whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the Fund's Shares is subject to trading halts caused by extraordinary market volatility pursuant to NYSE Rule 80B. The Exchange also may halt trading in the Fund if the Index Value or IIV applicable to the Fund is no longer calculated or disseminated, as provided by NYSE Rule 1100(f)(1).<sup>26</sup>

Surveillance. The Exchange will utilize its existing surveillance procedures applicable to equity securities to monitor trading of the Shares of the Fund. Surveillance procedures applicable to trading of the Shares are comparable to those applicable to other Investment Company Units currently trading on the Exchange. The Exchange represents that such surveillance procedures are adequate to properly monitor the trading of the Fund Shares. 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 also obtain trading information via the

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applicable Exchange and Federal rules and regulations, including due diligence obligations under NYSE Rule 405 (Diligence as to Accounts).

<sup>26</sup> NYSE Rule 1100(f)(1) states, in relevant part, that if the estimate, updated at least every 15 seconds, of the IIV or the Index value applicable to a series of Investment Company Units is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the Index value occurs. If the interruption to the dissemination of the IIV or the Index value 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. See also Section 703.16(H) of the NYSE Listed

Intermarket Surveillance Group (“ISG”) from other exchanges who are members or affiliate members of ISG.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6 of the Act,<sup>27</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>28</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

### B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited for nor received any written comments on the proposed rule change.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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Company Manual (setting forth additional circumstances that could trigger the suspension of trading and delisting of the Shares).

<sup>27</sup> 15 U.S.C. 78f.

<sup>28</sup> 15 U.S.C. 78f(b)(5).

Electronic Comments:

- Use the Commission's Internet comment form ([www.sec.gov/rules/sro.shtml](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-NYSE-2007-46 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2007-46. 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 ([www.sec.gov/rules/sro.shtml](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 10:00 am and 3:00 pm. Copies of the 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-NYSE-2007-46 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>29</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>30</sup> which requires that the rules of an exchange be designed, among other things, 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. Although Section 703.16 of the NYSE Listed Company Manual permits the Exchange to either originally list and trade Investment Company Units or trade Investment Company Units pursuant to unlisted trading privileges, the Shares do not meet the "generic" listing requirements of Section 703.16 of the NYSE Listed Company Manual (permitting listing in reliance upon Rule 19b-4(e)<sup>31</sup> under the Act) because the components of the Index underlying the Fund do not meet the initial listing requirements of Section 703.16(C)(2)(b)(ii) of the Listed Company Manual. Section 703.16(C)(2)(b)(ii) of the NYSE Listed Company Manual requires that, upon the initial listing of any series of Investment Company Units, the component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each must have minimum worldwide trading volume during each of the last six months of at least 250,000 shares. The Exchange represents that Index component stocks each having a worldwide monthly trading volume of at least 250,000 shares in the aggregate account for approximately 86.2% of the weight of the Index in

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<sup>29</sup> In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

the aggregate during each month from November 2006 through April 2007. Because such percentage misses the minimum required threshold by approximately 3.8%, the Shares cannot be listed and traded pursuant to Section 703.16 of the NYSE Listed Company Manual. The Commission believes, however, that the listing and trading of the Shares would be consistent with the Act. The Commission notes that it has previously approved exchange rules that contemplate the listing and trading of derivative securities products based on indices that were composed of stocks that did not meet certain quantitative generic listing criteria by only a slight margin.<sup>32</sup> The Commission also notes that the Fund is substantially similar in structure and operation to other HealthShares™ exchange-traded funds, the shares of which are currently listed and trading on the Exchange.<sup>33</sup>

The Commission further believes that the proposal is consistent with Section

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<sup>31</sup> 17 CFR 240.19b-4(e).

<sup>32</sup> See Securities Exchange Act Release Nos. 55699 (May 3, 2007), 72 FR 26435 (May 9, 2007) (SR-NYSEArca-2007-27) (approving the listing and trading of shares of the iShares FTSE NAREIT Residential Index Fund where the weighting of the five highest components of the underlying index was marginally higher than that allowed by NYSE Arca, Inc.'s relevant generic listing standards); and 52826 (November 22, 2005), 70 FR 71874 (November 30, 2005) (SR-NYSEArca-2005-67) (approving the listing and trading of shares of the iShares Dow Jones U.S. Energy Sector Index Fund and the iShares Dow Jones U.S. Telecommunications Sector Index Fund where the weightings of the most heavily weighted component stock and the five highest components of the underlying indexes, respectively, were higher than that required by NYSE Arca, Inc.'s relevant generic listing standards). See also Securities Exchange Act Release No. 46306 (August 2, 2002), 67 FR 51916 (August 9, 2002) (SR-NYSE-2002-28) (approving the trading pursuant to unlisted trading privileges of shares of Vanguard Total Stock Market VIPERs, iShares Russell 2000 Index Funds, iShares Russell 2000 Value Index Funds, and iShares Russell 2000 Growth Funds, none of which met the trading volume requirement of the relevant generic listing criteria for NYSE).

<sup>33</sup> Telephone conversation between Michael Cavalier, Assistant General Counsel, NYSE, and Edward Cho, Special Counsel, Division, Commission, on June 4, 2007 (confirming that the shares of other HealthShares™ exchange-traded funds were listed pursuant to Rule 19b-4(e) under the Act because they met the “generic” listing standards under Section 703.16 of the NYSE Listed Company Manual). See 17 CFR 240.19b-4(e).

11A(a)(1)(C)(iii) of the Act,<sup>34</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. The Exchange, through the facilities of the Consolidated Tape Association or a major market data vendor, will disseminate the IIV at least every 15 seconds during Exchange trading hours. In addition, one or more major market data vendors will calculate and disseminate an updated, intra-day value of the Underlying Index on a real-time basis during Exchange trading hours and the closing value of such Underlying Index once each trading day. BNY Asset Management will calculate and disseminate once each trading day the NAV to all market participants at the same time. The Corporation's Web site at [www.healthsharesinc.com](http://www.healthsharesinc.com) will include information pertaining to the Index and its component securities, the Index Methodology, the NAV and the prior day's NAV, the Bid-Ask Price and related information, the Prospectus and Statement of Additional Information, and other relevant trading information. The Advisor will make available on each business day, prior to the opening of trading on the Exchange, the Creation List and Redemption List. Moreover, the closing prices of the Fund's Deposit Securities are readily available from the relevant exchange, automated quotation systems, and major market data vendors. Information regarding the market, closing prices, and trading volume of the Shares will be publicly available on a real-time basis throughout the trading day and in the daily publications of financial news services. In sum, the Commission believes that the proposal is reasonably designed to facilitate access to information that could assist investors in properly valuing the Shares.

The Commission finds that the Exchange's proposed rules and procedures for trading of

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<sup>34</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

the Shares are consistent with the Act. The Shares will trade as equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

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

- (1) The Exchange would utilize its existing surveillance procedures applicable to equity securities to monitor trading of the Shares of the Fund. Surveillance procedures applicable to trading of the Shares are comparable to those applicable to other Investment Company Units currently trading on the Exchange. The Exchange represents that such surveillance procedures are adequate to properly monitor the trading of the Fund Shares. 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 also obtain trading information via the ISG from other exchanges who are members or affiliate members of ISG.
- (2) The Index Administrator is neither a registered broker-dealer nor an "affiliated person," as defined in Section 2(a)(3) of the 1940 Act, or an affiliated person of an affiliated person of the Fund, Advisor, Sub-Advisor, Distributor, or the Corporation.
- (3) In order to halt the trading of the Shares, the Exchange may consider, among other things, factors such as the extent to which trading is not occurring in an underlying security and whether other unusual conditions or circumstances

detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the Fund's shares is subject to trading halts caused by extraordinary market volatility pursuant to NYSE Rule 80B. The Exchange also may halt trading in the Fund if the Index Value or IIV applicable to the Fund is no longer calculated or disseminated, as provided by NYSE Rule 1100(f)(1).<sup>35</sup>

- (4) The Exchange will distribute a Memo to its members in connection with the trading of the Shares of the Fund. The Memo will discuss the special characteristics and risks of trading this type of security. In addition, the Memo, among other things, will discuss what the Fund is, how the Fund's shares are created and redeemed, the requirement that members and member firms deliver a prospectus or product description to investors purchasing shares of the Fund prior to or concurrently with the confirmation of a transaction,<sup>36</sup> the applicable Exchange rules, dissemination information, trading information, and the applicable suitability rules. The Memo will also discuss exemptive, no-action, and interpretive relief granted by the Commission from Section 11(d)(1) and certain other rules under the Act, if applicable.

This order is conditioned on the Exchange's adherence to the foregoing representations.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the Federal Register. As referenced above, the Commission notes that the Fund is substantially similar in structure, operation, and function to other HealthShares™ exchange-traded funds, the shares of which are currently listed and trading

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<sup>35</sup> See supra note 26.

<sup>36</sup> See supra note 24.

on the Exchange pursuant to Rule 19b-4(e) under the Act.<sup>37</sup> In addition, the Commission notes that it has previously approved exchange rules that contemplate the listing and trading of derivative securities products based on indices that were composed of stocks that did not meet certain quantitative generic listing criteria by similar amounts.<sup>38</sup> Although the Fund Shares do not meet the initial listing requirement of Section 703.16(C)(2)(b)(ii) of the NYSE Listed Company Manual<sup>39</sup> and therefore cannot be listed pursuant to Rule 19b-4(e), the Commission believes that the Shares are substantially similar to the other HealthShares™ trading on the Exchange and notes that the Shares will otherwise comply with all other “generic” listing requirements under Section 703.16.<sup>40</sup> The listing and trading of the Shares do not appear to present any new or significant regulatory concerns. Therefore, the Commission believes that accelerating approval of this proposal would allow the Shares to trade on the Exchange without undue delay and should generate additional competition in the market for such products.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>41</sup> that the

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<sup>37</sup> See supra note 33.

<sup>38</sup> See supra note 32.

<sup>39</sup> See supra note 8.

<sup>40</sup> See id.

<sup>41</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NYSE-2007-46), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>42</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>42</sup> 17 CFR 200.30-3(a)(12).