

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57962; File No. SR-NASDAQ-2008-039)

June 13, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Managed Fund Shares

I. Introduction

On April 30, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change seeking to adopt new Nasdaq Rule 4420(o) to list and trade, or trade pursuant to unlisted trading privileges (“UTP”), securities issued by actively managed, open-end investment management companies (“Managed Fund Shares”) and to amend certain other Nasdaq rules to incorporate references to such Managed Fund Shares. On May 7, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on May 14, 2008.³ The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to add new Nasdaq Rule 4420(o) to permit the listing and trading, or trading pursuant to UTP, of Managed Fund Shares.⁴ The Exchange also proposes to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 57800 (May 8, 2008), 73 FR 27874 (“Notice”).

⁴ Proposed Nasdaq Rule 4420(o) is substantively identical to NYSE Arca Equities Rule 8.600. See Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544

make conforming changes to the introductory paragraph of Nasdaq Rule 4420, Nasdaq Rules 4120(a)(9) and 4120(b)(4)(A), which relate to trading halts, and Nasdaq Rule 4540, which relates to entry and annual fees for issuers, to incorporate references to Managed Fund Shares.

Proposed Listing Rules for Managed Fund Shares

Proposed Nasdaq Rule 4420(o)(2)(A) provides that Nasdaq will file separate proposals under Section 19(b) of the Act before the listing and/or trading of Managed Fund Shares.

Proposed Nasdaq Rule 4420(o)(2)(B) provides that transactions in Managed Fund Shares will occur throughout Nasdaq's trading hours.⁵ Proposed Nasdaq Rule 4420(o)(2)(C) provides that

the minimum price variation for quoting and entry of orders in Managed Fund Shares will be \$0.01. Proposed Rule Nasdaq 4420(o)(2)(D) provides that Nasdaq will implement written

surveillance procedures for Managed Fund Shares. Proposed Nasdaq Rule 4420(o)(2)(E)

provides that, for Managed Fund Shares based on an international or global portfolio, the

statutory prospectus or the application for exemption from provisions of the Investment

Company Act of 1940 ("1940 Act") for such series of Managed Fund Shares must state that such

series must comply with the federal securities laws in accepting securities for deposits and

satisfying redemptions with redemption securities, including that the securities accepted for

deposits and the securities used to satisfy redemption requests are sold in transactions that would

be exempt from registration under the Securities Act of 1933.

Proposed Definitions. Proposed Nasdaq Rule 4420(o)(3)(A) defines the term "Managed

(April 10, 2008) (SR-NYSEArca-2008-25) (approving, among other things, listing standards for Managed Fund Shares).

⁵ See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 7:00 a.m. to 9:30 a.m.; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m.).

Fund Share” as a security that: (1) represents an interest in a registered investment company (“Investment Company”) organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (2) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (“NAV”); and (3) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV.

In addition, proposed Nasdaq Rule 4420(o)(3)(B) defines the term “Disclosed Portfolio” as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of NAV at the end of the business day. Proposed Nasdaq Rule 4420(o)(3)(C) defines the term “Intraday Indicative Value” as the estimated indicative value of a Managed Fund Share based on current information regarding the value of the securities and other assets in the Disclosed Portfolio. Proposed Nasdaq Rule 4420(o)(3)(D) defines the term “Reporting Authority” as Nasdaq, an institution, or a reporting service designated by Nasdaq or by the exchange that lists a particular series of Managed Fund Shares (if Nasdaq is trading such series pursuant to UTP) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Intraday Indicative Value, the Disclosed Portfolio, the amount of any cash distribution to holders of Managed Fund Shares, NAV, or other information relating to the issuance, redemption, or trading of Managed Fund Shares. A series of Managed Fund Shares may have more than one Reporting Authority, each having different functions.

Initial and Continued Listing. Proposed Nasdaq Rule 4420(o)(4) sets forth the initial and continued listing criteria applicable to Managed Fund Shares.⁶ Proposed Nasdaq Rule 4420(o)(4)(A)(i) provides that, for each series of Managed Fund Shares, Nasdaq will establish a minimum number of Managed Fund Shares required to be outstanding at the time of commencement of trading. In addition, under proposed Nasdaq Rule 4420(o)(4)(A)(ii), Nasdaq must obtain a representation from the issuer of each series of Managed Fund Shares that the NAV per share for such series will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Proposed Nasdaq Rule 4420(o)(4)(B) provides that each series of Managed Fund Shares will be listed and traded subject to the application of the following continued listing criteria: (1) the Intraday Indicative Value for Managed Fund Shares must be widely disseminated by one or

⁶ The Exchange represented that, for initial and/or continued listing, Managed Fund Shares must also be in compliance with Rule 10A-3 under the Act. See 17 CFR 240.10A-3. In addition, the Exchange represented that, with respect to a series of Managed Fund Shares, the investment adviser and its related personnel are subject to Rule 204A-1 under the Investment Advisers Act of 1940 (“Advisers Act”), which relates to codes of ethics for investment advisers. See 17 CFR 275.204A-1. Rule 204A-1 requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, the Exchange noted that “firewall” procedures, as well as procedures designed to prevent the misuse of non-public information by an investment adviser, must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act (17 CFR 275.206(4)-7) makes it unlawful for an investment adviser to provide investment advice to clients, unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the rules thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of such policies and procedures and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering such policies and procedures. See also Section 204A of the Advisers Act (15 U.S.C. 80b-4a) (requiring investment advisers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by such investment adviser or any person associated with such investment adviser).

more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on Nasdaq; (2) the Disclosed Portfolio must be disseminated at least once daily and made available to all market participants at the same time; and (3) the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

Proposed Nasdaq Rule 4420(o)(4)(B)(iii) provides that Nasdaq will consider the suspension of trading in, or removal from listing of, a series of Managed Fund Shares under any of the following circumstances: (1) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of Management Fund Shares for 30 or more consecutive trading days; (2) if the value of the Intraday Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time; (3) if the Investment Company issuing the Managed Fund Shares has failed to file any filings required by the Commission or if Nasdaq is aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Fund Shares; or (4) if such other event shall occur or condition exists which, in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Proposed Nasdaq Rule 4420(o)(4)(B)(iv) provides that, if the Intraday Indicative Value of a series of Managed Fund Shares is not being disseminated as required, Nasdaq may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists

past the trading day in which it occurred, Nasdaq will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Fund Shares is trading on Nasdaq pursuant to UTP, Nasdaq will halt trading in that series, as specified in Nasdaq Rules 4120 and 4121. In addition, if the Exchange becomes aware that NAV or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants.

In addition, proposed Nasdaq Rule 4420(o)(4)(B)(v) provides that, upon termination of an Investment Company, the Managed Fund Shares issued in connection with such entity must be removed from listing on Nasdaq. Proposed Nasdaq Rule 4420(o)(4)(B)(vi) provides that voting rights must be as set forth in the applicable Investment Company prospectus. Proposed Nasdaq Rule 4420(o)(5) relates to the limitation of liability of the Exchange in connection with an issuance of a series of Managed Fund Shares.

Proposed Nasdaq Rule 4420(o)(6) relates to obligations with respect to those Managed Fund Shares that receive an exemption from certain prospectus delivery requirements under Section 24(d) of the 1940 Act. Lastly, proposed Nasdaq Rule 4420(o)(7) provides that, if the investment adviser of the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser must erect a “firewall” between such investment adviser and broker-dealer with respect to access to information regarding the composition and/or changes to the Investment Company’s portfolio. This proposed rule also requires personnel who make decisions on the Investment Company’s portfolio composition to be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Investment Company’s portfolio.

Other Proposed Rule Changes

The Exchange also proposes to amend: (1) the introductory paragraph of Nasdaq Rule 4420 to add a reference to new paragraph (o) thereunder; (2) Nasdaq Rule 4120(a)(9) and Nasdaq Rule 4120(b)(4)(A) to add references to Managed Fund Shares with respect to trading halts;⁷ and (3) Nasdaq Rule 4540(a) and (b) to add references to Managed Fund Shares to those securities already covered under the rule relating to both entry and annual fees.

Trading Halts

Nasdaq will halt trading in Managed Fund Shares under the conditions specified in Nasdaq Rules 4120 and 4121, as proposed to be amended, and in proposed Nasdaq Rule 4420(o)(4)(B)(iv), as discussed above. With respect to trading of Managed Fund Shares pursuant to UTP, the conditions for a halt include a regulatory halt by the listing market, and Nasdaq will stop trading Managed Fund Shares if the listing market delists them. Additionally, Nasdaq may cease trading Managed Fund Shares if other unusual conditions or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market.

Trading Rules

Nasdaq deems Managed Fund Shares to be equity securities, thus rendering trading in the Managed Fund Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in Managed Fund Shares from 7:00 a.m. until 8:00 p.m. Eastern Time.⁸

⁷ Nasdaq also seeks to make an unrelated, minor typographical change to Nasdaq Rule 4120(b)(4)(A) with respect to the term "Trust Issued Receipt."

⁸ See supra note 5.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (including exchange-traded funds) to monitor trading in Managed Fund Shares and represents that such procedures are adequate to address any concerns regarding the trading of Managed Fund Shares on Nasdaq. Trading of Managed Fund Shares on Nasdaq will be subject to surveillance procedures of the Financial Industry Regulatory Authority (“FINRA”) for equity securities, in general, and exchange-traded funds, in particular.⁹ The Exchange may also obtain information via the Intermarket Surveillance Group (“ISG”) from other exchanges who are members or affiliate members of ISG.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading Managed Fund Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Managed Fund Shares in Creation Units (and that Managed Fund Shares are not individually redeemable); (2) Nasdaq Rule 2310, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in Managed Fund Shares to customers; (3) how information regarding the Intraday Indicative Value is disseminated; (4) the requirement that members deliver a prospectus to investors purchasing newly issued Managed Fund Shares prior to or concurrently with the confirmation of a

⁹ The Exchange stated that FINRA surveils trading on Nasdaq pursuant to a regulatory services agreement. Nasdaq is responsible for FINRA’s performance under this regulatory services agreement.

transaction;¹⁰ (5) the risks involved in trading Managed Fund Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Fund value will not be calculated or publicly disseminated; (6) any exemptive, no-action, or interpretive relief granted by the Commission from any rules under the Act; (7) related fees and expenses; (8) trading hours of the Managed Fund Shares; (9) NAV calculation and dissemination; and (10) trading information.

Additional discussion regarding the key features of Managed Fund Shares, including the registration requirement under the 1940 Act, exemptive relief from certain requirements under the 1940 Act, intraday trading, creations and redemptions, the Disclosed Portfolio, and the Intraday Indicative Value can be found in the Notice.¹¹

III. Discussion

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.¹² In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,¹³ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. The Commission

¹⁰ The Exchange further noted that: (1) investors purchasing Managed Fund Shares directly from a Fund will receive a prospectus; and (2) members purchasing Managed Fund Shares from a Fund for resale to investors will deliver a prospectus to such investors.

¹¹ See Notice, *supra* note 3.

¹² In approving this proposed 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).

¹³ 15 U.S.C. 78f(b)(5).

notes that it has previously approved substantively identical listing standards for Managed Fund Shares for other national securities exchanges.¹⁴

The Commission finds that Nasdaq's proposal contains adequate rules and procedures to govern the listing and trading of Managed Fund Shares on the Exchange.¹⁵ Prior to listing and/or trading on the Exchange, Nasdaq must file a separate proposed rule change pursuant to Section 19(b) of the Act for each series of Managed Fund Shares. All such securities listed and/or traded under proposed Nasdaq Rule 4420(o) will be subject to the full panoply of Nasdaq rules and procedures that currently govern the trading of equity securities on the Exchange.

For the initial listing of each series of Managed Fund Shares under proposed Nasdaq Rule 4420(o), the Exchange must establish a minimum number of Managed Fund Shares required to be outstanding at the commencement of trading. In addition, the Exchange must obtain a representation from the issuer of Managed Fund Shares that the NAV per share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

The Commission believes that the proposed continued listing and trading standards under proposed Nasdaq Rule 4420(o)(4)(B) are adequate to ensure transparency of key values and

¹⁴ See Securities Exchange Act Release Nos. 57514 (March 17, 2008), 73 FR 15230 (March 21, 2008) (SR-Amex-2008-02) (approving, among other things, listing standards for Managed Fund Shares); and 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving, among other things, listing standards for Managed Fund Shares).

¹⁵ The Commission believes that the proposed rules and procedures are adequate with respect to the Managed Fund Shares. However, the Commission notes that other proposed series of Managed Fund Shares may require additional Exchange rules and procedures to govern their listing and trading on the Exchange. For example, in the case of a proposed series of Managed Fund Shares that are based on a portfolio, at least in part, of non-U.S. securities, rules relating to comprehensive surveillance sharing agreements and quantitative initial and continued listing standards may be required.

information regarding the securities. For continued listing of each series of Managed Fund Shares, the Intraday Indicative Value must be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on the Exchange. Further, the Disclosed Portfolio must be disseminated at least once daily and made available to all market participants at the same time.

The Commission finds that the Exchange's rules with respect to trading halts under proposed Nasdaq Rule 4120(a)(9), proposed Nasdaq Rule 4120(b)(4)(A), and proposed Nasdaq Rule 4420(o)(4)(B)(iv) should help ensure the availability of key values and information relating to Managed Fund Shares. If the Intraday Indicative Value is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption of such value persists past the trading day in which it occurred, the Exchange must halt trading no later than the beginning of the trading day following the interruption.¹⁶ In addition, if the Exchange becomes aware that the NAV or Disclosed Portfolio related to a series of Managed Fund Shares is not being disseminated to all market participants at the same time, the Exchange will halt trading in such series of Managed Fund Shares.¹⁷ Finally, Nasdaq may cease trading Managed Fund Shares if other unusual conditions or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market.

¹⁶ Under proposed Nasdaq Rule 4420(o)(4)(B)(iv), if a series of Managed Fund Shares is trading on the Exchange pursuant to unlisted trading privileges, the Exchange will halt trading in that series, as specified in Nasdaq Rules 4120, as proposed to be amended, and 4121. See Nasdaq Rules 4120 and 4121 (setting forth rules regarding trading halts for certain derivative securities products).

¹⁷ The Exchange may resume trading in such series of Managed Fund Shares only when the NAV or Disclosed Portfolio is disseminated to all market participants. See proposed Nasdaq Rule 4420(o)(4)(B)(iv).

The Exchange may also consider the suspension of trading in, or removal from listing of, a series of Managed Fund Shares if: (1) following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of the Managed Fund Shares for 30 or more consecutive trading days; (2) the value of the Portfolio Indicative Value is no longer calculated or available, or the Disclosed Portfolio is not made available to all market participants at the same time; (3) the Investment Company issuing the Managed Fund Shares has failed to file any required filings with the Commission, or if the Exchange becomes aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Fund Shares; or (4) such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings of the Managed Fund Shares on the Exchange inadvisable.

The Commission believes that the requirements of proposed Nasdaq Rule 4420(o) should help to prevent trading when a reasonable degree of transparency cannot be assured and to maintain a fair and orderly market for Managed Fund Shares. The Commission also believes that the proposed listing and trading rules for Managed Fund Shares, many of which track existing Exchange rules relating to exchange-traded funds, are reasonably designed to promote a fair and orderly market for such Managed Fund Shares. Specifically, proposed Nasdaq Rule 4420(o)(7) requires that: (1) if the investment adviser of the Investment Company is affiliated with a broker-dealer, such investment adviser must erect a “firewall” between such investment adviser and broker-dealer with respect to access to information regarding the composition and/or changes to the Investment Company’s portfolio; and (2) personnel who make decisions on the Investment Company’s portfolio composition must be subject to procedures designed to prevent

the use and dissemination of material non-public information regarding the Investment Company's portfolio.¹⁸ In addition, proposed Nasdaq Rule 4420(o)(4)(B)(ii)(b) requires that the Reporting Authority that provides the Disclosed Portfolio implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio. The proposed rules also require surveillance procedures,¹⁹ establish trading guidelines,²⁰ and impose other requirements.²¹

Conforming Changes and Listing Fees

Trading in Managed Fund Shares will be halted as provided in Nasdaq Rule 4120(a)(9), as proposed to be amended. In addition, Managed Fund Shares will be included under the term "Derivative Securities Product," as defined in Nasdaq Rule 4120(b)(4)(A), in connection with

¹⁸ See supra note 6.

¹⁹ See proposed Nasdaq Rule 4420(o)(2)(D) (providing that the Exchange will implement written surveillance procedures for Managed Fund Shares).

²⁰ See proposed Nasdaq Rule 4420(o)(2)(B) and (C) (providing that transactions in Managed Fund Shares will occur throughout Nasdaq's trading hours and that the minimum price variation for quoting and entry of orders in Managed Fund Shares must be \$0.01). See also supra note 5.

²¹ See e.g., proposed Nasdaq Rule 4420(o)(2)(E) (requiring certain statutory prospectuses for an issue of Managed Fund Shares based on an international or global portfolio to make certain specific statements regarding creations and redemptions); proposed Nasdaq Rule 4420(o)(4)(B)(v) (requiring, upon termination of an Investment Company, the Managed Fund Shares issued in connection with such Investment Company to be removed from listing on the Exchange); proposed Nasdaq Rule 4420(o)(4)(B)(vi) (providing that the voting rights will be as set forth in the applicable Investment Company prospectus); and proposed Nasdaq Rule 4420(o)(6) (requiring certain disclosures to be made in the case of a series of Managed Fund Shares that are subject of an order by the Commission exempting such securities from certain prospectus delivery requirements under Section 24(d) of the 1940 Act and are not otherwise subject to prospectus delivery requirements under the Securities Act of 1933).

trading halts for trading pursuant to UTP on the Exchange. The Commission also notes that Managed Fund Shares will be included in Nasdaq Rules 4540(a) and (b), and, as a result, the Exchange's listing fees will be applicable to a series of Managed Fund Shares. The Commission finds that the conforming changes made to the Exchange's rules, including those governing trading halts and listing fees, are reasonable and promote transparency of the rules to be imposed with respect to a series of Managed Fund Shares listed and traded on the Exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2008-039), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Florence E. Harmon
Acting Secretary

²² 15 U.S.C. 78s(b)(2).

²³ See 17 CFR 200.30-3(a)(12).