

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-27916; 812-13358]

HealthShares, Inc., *et al.*; Notice of Application

July 27, 2007

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of application to amend a prior order under section 6(c) of the Investment Company Act of 1940 (“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, 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 to amend a prior order that permits: (a) open-end management investment companies, whose series are based on certain equity securities indices created by an affiliate of the investment adviser, to issue shares redeemable only in large aggregations; (b) secondary market transactions in the shares of the series 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”); and (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 aggregations of the series’ shares (“Prior Order”).<sup>1</sup> Applicants seek to amend the Prior Order in order to offer additional series that would hold equity and fixed income securities and to provide that certain representations and undertakings contained in the Prior Order shall not apply to a series where an entity that creates, compiles, sponsors, or maintains an underlying index is not an affiliated

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<sup>1</sup> HealthShares, Inc., et al., Investment Company Act Release Nos. 27553 (November 16, 2006) (notice) and 27594 (December 7, 2006) (order).

person, or an affiliated person of an affiliated person, of the series, its investment adviser, distributor, promoter, or any sub-adviser to the series. In addition, the order would delete a condition related to future relief in the Prior Order.

Applicants: HealthShares, Inc., XShares Advisors LLC (formerly, X-Shares Advisors, LLC) (the “Advisor”), XShares Group LLC (formerly, Ferghana-Wellspring LLC) and TDAX Funds, Inc.

Filing Dates: The application was filed on January 19, 2007 and amended on June 4, 2007 and on July 20, 2007. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the requested relief 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 August 17, 2007, 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: Attn. Anthony F. Dudzinski, Esq., 420 Lexington Avenue, Suite 2550, New York, NY 10170; and Michael R. Rosella, Esq., Paul, Hastings, Janofsky & Walker LLP, Park Avenue Tower, 75 East 55<sup>th</sup> Street, First Floor, New York, NY 10022.

For Further Information Contact: Deepak T. Pai, Senior Counsel, at (202) 551-6876 or Mary

Kay Frech, Branch Chief, 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 Commission's Public Reference Branch, 100 F Street, NE, Washington, DC 20549-0102 (tel. 202-551-5850).

Applicants' Representations:

1. HealthShares, Inc. is an open-end management investment company organized as a Maryland corporation and is comprised of multiple series (the "Initial Funds"). TDAX Funds, Inc. (the "Company") is an open-end management investment company organized as a Maryland corporation that is comprised of five (5) series of underlying "lifecycle" portfolios (each a "New Fund" and together, the "New Funds"). The Advisor, which is registered as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"), serves as the investment adviser to the Initial Funds and will serve as investment adviser to the New Funds. The Advisor expects to enter into sub-advisory agreements with Amerivest Investment Management, LLC and BNY Investment Advisors (collectively, "Sub-Advisors") to serve as sub-advisers to the New Funds. Each Sub-Advisor is registered as an investment adviser under the Advisers Act. Neither Sub-Advisor is an affiliated person, or an affiliated person of an affiliated person, of the Advisor or Zacks Investment Research Inc. ("Zacks"), the creator of the Underlying Indexes (as defined below). ALPS Distributors, Inc. (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 New Funds.

2. The applicants are currently permitted to offer the Initial Funds based on equity securities indices developed by an affiliated person of the Advisor in reliance on the Prior Order.

Applicants seek to amend the Prior Order to permit the offering of the New Funds, as well as series that may be created in the future that are advised by the Advisor or an entity controlled by or under common control with the Advisor and that comply with the terms and conditions of the Prior Order, as modified by the requested relief (the “Future Funds,” together with the Initial Funds and the New Funds, the “Funds”). The New Funds would operate in a manner identical to the Initial Funds that are subject to the Prior Order, except as described in the application.

3. The investment objective of each New Fund is to track the performance, before fees and expenses, of a particular underlying index (“Underlying Index”) by investing in a portfolio of securities generally consisting of the component securities (“Component Securities”) of the Underlying Index.<sup>2</sup> Each Underlying Index is a “lifestyle” index that rebalances allocations among asset classes over time in an attempt to maximize capital appreciation at a target date. 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 Company, the Advisor, the Distributor, promoter, or any sub-adviser to a New Fund.

4. The applicants represent that the Component Securities of each Underlying Index include equity securities of U.S. and international companies (including common stocks and real estate investment trusts), American Depositary Receipts based on equity securities of international companies, and fixed-income securities (including bonds, treasury bills and notes, mortgage real estate investment trusts, U.S. government agency mortgage pass-through securities, cash equivalents or short-term money market instruments). The fixed income

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<sup>2</sup> The Underlying Indices for the New Funds are the Zacks 2010 Lifecycle Index, Zacks 2020 Lifecycle Index, Zacks 2030 Lifecycle Index, Zacks 2040 Lifecycle Index, and Zacks In-Target Lifecycle Index.

securities included in the Component Securities will be investment grade fixed income securities and will not include corporate mortgage-backed securities, asset-backed securities, high yield bonds, or Rule 144A securities.<sup>3</sup> Each New Fund will attempt to track its Underlying Index by investing at least 90%, and typically substantially all, of its assets in the securities that make up the Underlying Index, holding each security in approximately the same proportion as its weighting in the Underlying Index.<sup>4</sup> Each New Fund also may invest up to 10% of its assets in futures contracts, options on futures contracts, options, as well as swaps on securities of companies in the Underlying Index. Applicants expect that the returns of each New Fund should be highly correlated with the returns of its Underlying Index, expecting that the correlation coefficient between each New Fund and its Underlying Index will exceed 95% over extended periods.

5. The Prior Order relates to Funds that track indices created by an affiliated person of the Advisor. Because such Funds could introduce potential conflicts of interest, the Prior Order contains certain representations and undertakings relating to the transparency of the methodology for those underlying indices, and the establishment of certain policies and procedures to limit communication between index personnel and employees of the Advisor and

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<sup>3</sup> If an underlying index of a Future Fund includes restricted securities eligible for resale pursuant to rule 144A under the Securities Act (“Rule 144A securities”), applicants acknowledge that in accepting deposit securities (“Deposit Securities”) and satisfying redemptions with securities that are Rule 144A securities, the Future Funds will comply with the conditions of rule 144A. The prospectus for a Future Fund would also state that an authorized participant that is not a “Qualified Institutional Buyer,” as defined in rule 144A under the Securities Act, will not be able to receive, as part of a redemption, restricted securities eligible for resale under rule 144A.

<sup>4</sup> The New Funds may seek to track the performance of any U.S. government agency mortgage pass-through securities included in an Underlying Index by investing in “to-be announced” (“TBA”) transactions on such securities. A TBA transaction is a method of trading mortgage-backed securities where the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered are determined two days prior to settlement date. A New Fund may designate the mortgage pass-through TBAs to be included in the Deposit Securities and will accept “cash in lieu” of delivery of the designated mortgage pass-through TBAs. The amount of substituted cash in the case of TBA transactions will be equivalent to the value of the TBA transaction listed as a Deposit Security.

any sub-adviser. Applicants assert that these conflicts of interest do not exist where the index creator is not an affiliated person, or an affiliated person of an affiliated person, of an exchange-traded fund or its investment adviser or any sub-adviser, such as in the case of the New Funds. Applicants therefore seek to amend the Prior Order to provide that the relevant representations and undertakings shall not apply to a Fund where an entity that creates, compiles, sponsors, or maintains the underlying index is not an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Fund, the Advisor, the Distributor, promoter or any sub-adviser to a Fund.

6. Applicants state that the New Funds will operate in a manner identical to the operation of the Initial Funds in the Prior Order, except as specifically noted by applicants (and summarized in this notice), and will comply with all of the terms, provisions and conditions of the Prior Order, as amended by the present application. Applicants believe that the requested relief continues to meet the necessary exemptive standards.

7. Applicants also seek to amend the Prior Order to modify the terms under which the applicants, in the future, may offer Future Funds based on other equity or fixed income indices. The Prior Order is currently subject to a condition that does not permit applicants to register the shares of any Future Fund by means of filing a post-effective amendment to a Fund's registration statement or by any other means, unless applicants have requested and received with respect to such Future Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission, or if the Future Fund could be listed on a national securities exchange ("Exchange") without the need for a filing pursuant to rule 19b-4 under the Exchange Act.

8. The order would amend the Prior Order to delete this condition. Any Future Funds will (a) be advised by the Advisor or an entity controlled by or under common control with the Advisor; and (b) comply with the terms and conditions of the Prior Order, as amended by any order issued in connection with the present application.

9. Applicants believe that the modification of the future relief available under the Prior Order would be consistent with sections 6(c) and 17(b) of the Act and that granting the requested relief will facilitate the timely creation of Future Funds and the commencement of secondary market trading of such Future Funds by removing the need to seek additional exemptive relief. Applicants submit that the terms and conditions of the Prior Order, as amended by the requested order, are appropriate for the Funds and would remain appropriate for Future Funds. Applicants also submit that tying exemptive relief under the Act to the ability of a Future Fund to be listed on an Exchange without the need for a rule 19b-4 filing under the Exchange Act is not necessary to meet the standards under sections 6(c) and 17(b) of the Act.

**Applicants' Condition:**

Applicants agree that any amended order granting the requested relief will be subject to the same conditions as those imposed by the Prior Order, except for condition 1 to the Prior Order, which will be deleted.

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

Florence E. Harmon  
Deputy Secretary