

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59214; File No. SR-NASDAQ-2008-096)

January 7, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Generic Listing Standards for Index Multiple Exchange Traded Fund Shares and Index Inverse Exchange Traded Fund Shares

I. Introduction

On December 9, 2008, The NASDAQ Stock Market LLC (“Nasdaq”) 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 to permit Nasdaq to list and trade, or trade pursuant to unlisted trading privileges (“UTP”), shares of a series of Index Multiple Exchange Traded Fund Shares (“Multiple Fund Shares”) and Index Inverse Exchange Traded Fund Shares (“Inverse Fund Shares”) (collectively, the “Fund Shares”). The proposed rule change was published in the Federal Register on December 22, 2008 for a 15-day comment period.³ The Commission received no comments on the proposal. This order approves the proposed rule change on an accelerated basis.

II. Description of the Proposal

Nasdaq Rule 4420(j) provides standards for listing Index Fund Shares (“IFSS”) on the Exchange. Nasdaq proposes to revise Nasdaq Rule 4420(j)(1)(B)(iii) to allow the listing and trading of Multiple Fund Shares and Inverse Fund Shares that sought to provide investment results, before fees and expenses, in an amount not exceeding -300%, rather than -200%, of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59098 (December 12, 2008), 73 FR 78415 (“Notice”).

underlying benchmark index pursuant to Rule 19b-4(e) under the Act,⁴ where the other applicable generic listing standards for IFSs are satisfied. In connection with Inverse Funds that seek to provide investment results, before fees and expenses, in an amount that exceeds -300% of the underlying benchmark index, the Exchange's proposal would continue to require specific Commission approval pursuant to Section 19(b)(2) of the Act.⁵ In particular, Nasdaq Rule 4420(j)(1)(B)(iii) would expressly prohibit Inverse Funds that seek to provide investment results, before fees and expenses, in an amount that exceeds -300% of the underlying benchmark index, from being approved by the Exchange for listing and trading pursuant to Rule 19b-4(e) under the Act.⁶

Additional information about the proposed rule change and IFSs, including applicable generic listing standards, limitation on leverage, availability of information about Fund Shares and underlying indexes, trading halts, suitability, and surveillance, among other things, is contained in the Notice.⁷

III. Discussion and Accelerated Approval

After careful review, 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 and, in particular, with Section 6(b) of the Act⁸ and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent with

⁴ 17 CFR 240.19b-4(e).

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 240.19b-4(e).

⁷ See supra note 3.

⁸ 15 U.S.C. 78f(b).

Section 6(b)(5) of the Act⁹ which requires, among other things, that the rules of a national securities exchange be 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 a national market system, and, in general, to protect investors and the public interest.¹⁰

The Commission believes that the Exchange's proposal reasonably balances the removal of impediments to a free and open market with the protection of investors and the public interest, two principles set forth in Section 6(b)(5) of the Act. The Commission notes that it has previously approved the listing and trading of various leveraged exchange-traded funds, including trading pursuant to unlisted trading privileges on the Exchange, that seek daily investment results, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (-200%) of the underlying index.¹¹ The Commission also notes that the

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ See, e.g., Securities Exchange Act Release Nos. 56713 (October 29, 2007), 72 FR 61915 (November 1, 2007) (SR-Amex-2007-74) (approving the listing and trading of Rydex Leveraged Funds, Inverse Funds and Leveraged Inverse Funds); 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR-Amex-2004-62) (approving the listing and trading of the ProShares Ultra Funds and Short Funds); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR-Amex-2006-41) (approving the listing and trading of the ProShares UltraShort Funds); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR-Amex-2006-101) (approving the listing and trading of Ultra, Short and UltraShort Funds based on various indexes); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR-Amex-2007-60) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on various international indexes); and 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR-Amex-2007-104) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on several fixed income indexes, among others). See also, e.g., Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR-NYSEArca-2007-81) (approving UTP trading of shares of funds of Rydex ETF Trust); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR-NYSEArca-2007-79) (approving UTP trading of shares of eight funds of the ProShares Trust); 55125 (January 18, 2007), 72 FR

proposed rule change is substantially similar to another exchange's generic listing requirements for Multiple Fund Shares and Inverse Fund Shares.¹² With respect to the listing and trading of a series of Inverse Fund Shares that seek to provide investment results that exceed -300% of the percentage performance of an underlying benchmark index, the Commission further notes that the Exchange would be required to obtain prior Commission approval pursuant to Section 19(b)(2) of the Act.

The Commission also notes that Fund Shares must comply with all of the applicable provisions under Nasdaq Rule 4420(j), as proposed to be amended as well as all other requirements applicable to IFSs including, without limitation, requirements relating to the dissemination of intraday indicative value, index value, disclosure of portfolio holdings, rules and policies governing the trading of equity securities, trading hours, trading halts, surveillance, firewalls, and Information Circulars to member and member organizations, as set forth in prior Commission orders approving the generic listing rules applicable to the listing and trading of IFSs.

The Commission further notes that the proposed rule change is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. Nasdaq Rule 4420(j)(1)(B)(iv) requires daily public Web site disclosure of its portfolio holdings including, as applicable, the identity and number of shares held of each specific equity security, the identity and amount held of each fixed income security, the specific types of Financial

3462 (January 25, 2007) (SR-NYSEArca-2006-87) (approving UTP trading of shares of 81 funds of the ProShares Trust); and 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115) (approving UTP trading of shares of funds of the ProShares Trust).

¹² See Securities Exchange Act Release No. 58825 (October 21, 2008), 73 FR 63756 (October 27, 2008) (SR-NYSEArca-2008-89).

Instruments and characteristics of such instruments, and cash equivalents and the amount of cash held in the portfolio of a fund. With respect to such Financial Instruments, the Commission notes that a notification procedure will be implemented by the Exchange so that timely notice from the investment adviser of such Multiple or Inverse Fund is received by the Exchange when a particular Financial Instrument is in default or shortly to be in default. The Commission also notes that the Exchange would be required to halt trading if Nasdaq becomes aware that the NAV or the identities and quantities of the portfolio of securities and other assets with respect to a Fund Share is not disseminated to all market participants at the same time.

In addition, the Commission notes that the Exchange's suitability requirements would apply to the trading of Multiple Fund Shares and Inverse Fund Shares. Specifically, prior to commencement of trading, the Exchange will issue an Information Circular to its members and member organizations providing guidance with regard to member firm compliance responsibilities (including suitability obligations) when effecting transactions in the Fund Shares and highlighting the special risks and characteristics of Funds Shares as well as applicable Exchange rules.

In sum, the Commission believes that the Exchange's proposed amendments to Nasdaq Rule 4420(j) relating to the listing and trading of Multiple Fund Shares and Inverse Fund Shares should fulfill the intended objective of Rule 19b-4(e) under the Act by allowing such derivative securities products to be listed and traded without separate Commission approval. The Commission believes that the proposed rule change should facilitate the listing and trading of additional types of exchange-traded products and reduce the time frame for bringing these securities to market, thereby reducing the burdens on issuers and other market participants and promoting competition.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹³ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. The Commission notes that it has previously approved a substantially similar proposed rule change of another self-regulatory organization.¹⁴ No comments were received on the proposed rule change during the 15-day comment period, and the Commission believes that the Exchange's proposal does not present any novel regulatory issues. As such, the Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such products.

¹³ 17 CFR 240.10A-3.

¹⁴ See supra note 12.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-NASDAQ-2008-096) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).