

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59098; File No. SR-NASDAQ-2008-096)

December 12, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Generic Listing Standards for Index Multiple Exchange Traded Fund Shares and Index Inverse Exchange Traded Fund Shares

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 December 9, 2008, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq is filing a proposed rule change to amend Nasdaq Rule 4420(j) in connection with generic listing standards, which 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 would allow the listing and trading of Fund Shares that sought to provide investment results, before fees and expenses, in an amount not exceeding -300% (currently -200%) of the underlying benchmark index pursuant to Rule 19b-4(e) under the Act,<sup>3</sup> where the other applicable generic listing standards under Nasdaq Rule 4420(j) for Index Fund

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

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

Shares (“IFSs”) are satisfied. The proposed rule change is substantially identical to a recent NYSEArca filing, which has been considered previously by the Commission when the Commission approved the proposed rule change.<sup>4</sup>

The text of the proposed rule change is available from Nasdaq’s website at <http://nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below, and is 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

Nasdaq Rule 4420(j) provides standards for listing IFSs on the Exchange. Nasdaq proposes to amend Nasdaq Rule 4420(j)(1)(B)(iii) to allow the listing and trading of Fund Shares that sought to provide investment results, before fees and expenses, in an amount not exceeding -300% (currently -200%) of the underlying benchmark index where the other applicable generic listing standards under Nasdaq Rule 4420(j) for IFSs are satisfied. The Exchange also notes that the Commission has approved the original listing and trading of Fund Shares on the American

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<sup>3</sup> 17 CFR 240.19b-4(e).

<sup>4</sup> See Securities Exchange Act Release No. 58825 (October 21, 2008), 73 FR 63756 (October 27, 2008) (SR-NYSEArca-2008-89).

Stock Exchange LLC.<sup>5</sup>

### Generic Listing Standards

Nasdaq Rule 4420(j) provides standards for listing IFSs, which are securities issued by an open-end management investment company (open-end mutual fund) based on a portfolio of securities that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic securities index or fixed income index. Pursuant to Nasdaq Rule 4420(j)(1)(A), IFSs must be issued in a specified aggregate minimum number in return for a deposit of specified securities and/or a cash amount, with a value equal to the next determined net asset value (“NAV”). When aggregated in the same specified minimum number, IFSs must be redeemed by the issuer for the securities and/or cash, with a value equal to the next determined NAV. Consistent with Nasdaq Rule 4420(j)(9)(A)(ii), the NAV is calculated once a day after the close of the regular trading day.

The proposed revisions to Nasdaq Rule 4420(j)(1)(B)(iii) would 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 underlying benchmark index pursuant to Rule 19b-4(e) under the Act,<sup>6</sup> 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.<sup>7</sup> In particular, Nasdaq Rule

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<sup>5</sup> See Securities Exchange Act Release No. 57660 (April 14, 2008), 73 FR 21391 (April 21, 2008) (SR-Amex-2007-131).

<sup>6</sup> 17 CFR 240.19b-4(e).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

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.<sup>8</sup>

The Exchange believes that adopting generic listing and trading standards for Fund Shares based on domestic equity, international or global equity and/or fixed income securities indexes and applying Rule 19b-4(e) should fulfill the intended objective of that Rule by allowing those IFSs that satisfy the proposed standards to commence trading, without the need for individualized Commission approval. The proposed rule has the potential to reduce the time frame for bringing Fund Shares to market, thereby reducing the burdens on issuers and other market participants.<sup>9</sup>

The Commission has approved generic standards providing for the listing and trading of derivative products pursuant to Rule 19b-4(e) based on indexes previously approved by the Commission under Section 19(b)(2) of the Act<sup>10</sup> and the Exchange<sup>11</sup> also notes that the generic listing standards provide for indexes that have been approved by the Commission in connection with the listing of Portfolio Depository Receipts, Index Fund Shares or Index-Linked Securities.

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<sup>8</sup> 17 CFR 240.19b-4(e).

<sup>9</sup> The Exchange submits that the failure of a particular Fund Share portfolio to comply with the proposed generic listing and trading standards under Rule 19b-4(e) would not, however, preclude the Exchange from submitting a separate filing pursuant to Section 19(b)(2) requesting Commission approval to list and trade a particular Fund Share.

<sup>10</sup> 15 U.S.C. 78s(b)(2). See Securities Exchange Act Release No. 54765 (November 16, 2006), 71 FR 67668 (November 22, 2006) (SR-Nasdaq-2006-009) (Commodity-Linked Securities).

<sup>11</sup> See e-mail from Jonathan Cayne, Associate General Counsel, NASDAQ OMX, to David Liu, Assistant Director, Division of Trading and Markets, Commission, dated December 12, 2008 (“December 12 E-mail”).

The Exchange believes that the application of that standard to Fund Shares is appropriate because the underlying securities index will have been subject to detailed and specific Commission review in the context of the approval of listing of other derivatives.

The Exchange notes that existing Nasdaq Rule 4420(j)(9)(B) provides continued listing standards for all IFSs. For example, where the value of the underlying index or portfolio of securities on which the IFS is based is no longer calculated or available, or in the event that the IFS chooses to substitute a new index or portfolio for the existing index or portfolio, the Exchange would commence delisting proceedings if the new index or portfolio does not meet the requirements of and listing standards set forth in Nasdaq Rule 4420(j). If an IFS chose to substitute an index that did not meet all of the applicable generic listing standards of IFSs pursuant to Rule 19b-4(e) of the Act,<sup>12</sup> then, to continue to list and trade the IFS, approval by the Commission of a separate filing pursuant to Section 19(b)(2) of the Act<sup>13</sup> is required.<sup>14</sup> In addition, the Exchange further notes that existing Nasdaq Rule 4420(j)(9)(A)(ii) provides that, prior to approving an IFS for listing, the Exchange will obtain a representation from the issuer that the NAV per share will be calculated daily and made available to all market participants at the same time.

Nasdaq Rule 4420(j)(1)(B)(iv) provides for the halt of trading for Fund Shares if the Exchange becomes aware that the open-end investment company fails to properly disseminate the appropriate NAV to market participants at the same time. In addition, the rule also requires a halt to trading if the open-end investment company issuing the Fund Shares failed to provide daily public Web site disclosure of its portfolio holdings. In particular, Nasdaq Rule

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<sup>12</sup> 17 CFR 240.19b-4(e).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

4420(j)(1)(B)(iv) provides that the Exchange will halt trading in a series of Multiple Fund Shares and/or Inverse Fund Shares if the Exchange becomes aware that the open-end investment company issuing the Fund Shares fails to disseminate the appropriate NAV to all market participants at the same time and/or fails to provide daily public Web site disclosure of its portfolio holdings.

The investment objective associated with the Fund Shares must be expected to achieve investment results, before fees and expenses, by a specified multiple (Multiple Fund Shares) or inversely up to -300% (Inverse Fund Shares) of the underlying performance benchmark domestic equity, international or global equity and/or fixed income indexes, as applicable. Fund Shares differ from traditional exchange-traded fund shares in that they do not merely correspond to the performance of a given securities index, but rather attempt to match a multiple or inverse of such underlying index performance.

In order to achieve investment results that provide either a positive multiple or inverse of the benchmark index, Fund Shares may hold a combination of financial instruments, including, but not limited to: stock index futures contracts; options on futures; options on securities and indices; equity caps, collars and floors; swap agreements; forward contracts; repurchase agreements; and reverse repurchase agreements (the “Financial Instruments”). Normally, 100% of the value of the underlying portfolios for the Inverse Fund Shares will be devoted to Financial Instruments and money market instruments, including U.S. government securities and repurchase agreements (the “Money Market Instruments”). The underlying portfolios for Multiple Fund Shares may consist of a combination of securities, Financial Instruments and Money Market Instruments.

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<sup>14</sup> See December 12 E-mail, supra, note 11.

### Limitation on Leverage

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.<sup>15</sup> 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.<sup>16</sup>

In connection with Multiple Fund Shares, Nasdaq Rule 4420(j)(1)(B) does not provide a similar limitation on leverage. Instead, the proposal would permit the underlying registered management investment company or fund to seek to provide investment results, before fees and expenses, that correspond to any multiple, without limitation, of the percentage performance on given day of a particular domestic equity, international or global equity, or fixed income securities indexes or a combination thereof.

### Availability of Information About Fund Shares and Underlying Indexes

Nasdaq Rule 4420(j)(1)(B)(iv) provides that the portfolio composition of a Fund will be disclosed on a public Web site. Web site disclosure of portfolio holdings that form the basis for the calculation of the NAV by the issuer of a series of Fund Shares is made daily and includes, 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 Instruments and characteristics of such instruments, cash equivalents and amount of cash held in the portfolio of a

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

<sup>16</sup> 17 CFR 240.19b-4(e).

fund. This public Web site disclosure of the portfolio composition of a Fund, that forms the basis for the calculation of the NAV, coincides with the disclosure of the same information to “Authorized Participants.”<sup>17</sup> Investors have access to the current portfolio composition of a Fund through the Fund’s Web site and/or at the Exchange’s Web site at <http://www.nasdaqomx.com>.

### Trading Halts

Existing trading halt requirements for IFSs apply to Fund Shares. Nasdaq will halt trading in Fund Shares under the conditions specified in Nasdaq Rules 4120 and 4121, as well as subject to Nasdaq Rule 4420(j)(1)(B)(iv). The conditions for a halt include a regulatory halt by the listing market. UTP trading in Fund Shares will also be governed by provisions of Nasdaq Rule 4120(b) relating to temporary interruptions in the calculation or wide dissemination of the calculation of the estimated NAV (“Intraday Indicative Value”), which is updated regularly during the trading day, among other values.

If Nasdaq becomes aware that the NAV or the identities and quantities of the portfolio of securities and other assets (the “Disclosed Portfolio”) with respect to a Fund Share 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 the case of the Financial Instruments held by a Multiple or Inverse Fund, the Exchange represents that a notification procedure will be implemented so that timely notice from the investment adviser of such Multiple or Inverse Fund is received by the Exchange when a

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<sup>17</sup> Authorized Participants are the only persons that may place orders to create and redeem Creation Units. Authorized Participants must be registered broker-dealers or other securities market participants, such as banks and other financial institutions that are exempt from registration as broker-dealers to engage in securities transactions, who are



particular Financial Instrument is in default or shortly to be in default. The Exchange will then determine on a case-by-case basis whether a default of a particular Financial Instrument justifies a trading halt of the Multiple and/or Inverse Fund Shares.

Additionally, Nasdaq may cease trading 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. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c). Finally, Nasdaq will stop trading Fund Shares if the listing market delists them.

#### Suitability

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.

Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Fund Shares in Baskets (and that Fund Shares are not individually redeemable); (2) Nasdaq Rule 2310, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in 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 Fund Shares prior to or concurrently with the confirmation of a transaction; (5) the risks involved in trading Fund Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be

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participants in DTC. The format of the disclosure of portfolio holdings to Authorized

calculated or publicly disseminated; and (6) trading information.

The Exchange notes that investors purchasing Fund Shares directly from a Fund will receive a prospectus. Members purchasing Fund Shares from a Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will reference that Fund Shares are subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Fund Shares of the Funds and that the NAV for the Fund Shares will be calculated after 4:00 p.m. (Eastern Time) each trading day.

#### Surveillance

The Exchange utilizes its existing surveillance procedures applicable to derivative products (including exchange-traded funds) to monitor trading in Fund Shares. The Exchange represents that such procedures are adequate to address any concerns about the trading of Fund Shares on Nasdaq. Trading of Fund Shares through Nasdaq are subject to FINRA's surveillance procedures for equity securities in general and ETFs in particular.<sup>18</sup> The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliate members of the ISG.<sup>19</sup>

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<sup>18</sup> Participants may differ from the format of the public Web site disclosure.  
FINRA surveils trading on Nasdaq pursuant to a regulatory services agreement. Nasdaq is responsible for FINRA's performance under this regulatory services agreement.

<sup>19</sup> For a list of the current members and affiliate members of ISG, see [www.isgportal.com](http://www.isgportal.com).

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act<sup>20</sup> in general and Section 6(b)(5) of the Act<sup>21</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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rules will facilitate the listing and trading of Fund Shares and will enhance competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be

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<sup>20</sup> 15 U.S.C. 78f.

disapproved.

Nasdaq has requested accelerated approval of this proposed rule change prior to the 30<sup>th</sup> day after the date of publication of the notice of the filing thereof. The Commission has determined that a 15-day comment period is appropriate in this case.

#### IV. 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:

##### Electronic Comments:

- Use the Commission's Internet comment form (<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-NASDAQ-2008-096 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2008-096. 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 (<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

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<sup>21</sup> 15 U.S.C. 78f(b)(5).

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 a.m. and 3:00 p.m. 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-NASDAQ-2008-096 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Florence E. Harmon  
Acting Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).