

19b-4 thereunder,² a proposed rule change to clarify the application of certain Nasdaq listing rules when a Nasdaq-listed company combines with a non-Nasdaq entity. The proposed rule change was published for comment in the **Federal Register** on July 23, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Nasdaq Rule 4340(a) requires that an issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. The current Rule refers to such a transaction as a "Reverse Merger" and provides a non-exclusive list of factors that Nasdaq will consider to determine if a transaction should be considered a Reverse Merger for purposes of the Rule.⁴

Nasdaq notes that Rule 4340(a) was originally adopted in 1993 to address concerns associated with non-Nasdaq entities seeking a "backdoor listing" on Nasdaq through a business combination involving a Nasdaq issuer.⁵ In these combinations, a non-Nasdaq entity would purchase a Nasdaq issuer in a transaction that would result in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing.

While this Rule was originally adopted to deal with companies seeking a "backdoor listing" by acquiring a listed shell company, its language is not limited in that regard. Accordingly, Nasdaq states that it has applied the rule to any transaction where there is a change of control potentially allowing a non-Nasdaq entity to obtain a Nasdaq listing. For example, Nasdaq has applied the rule to mergers involving operating companies in substantially similar businesses and, in appropriate cases, to mergers of "equals," where the

companies are approximately the same size.⁶ This allows Nasdaq staff to review the post-transaction entity, including any new officers, directors and control persons, before the transaction is consummated, thereby allowing staff to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns.

However, given the use of the term "Reverse Merger" within Rule 4340(a), and the existence of a footnote in IM-4350-1 referring to "backdoor listings,"⁷ Nasdaq states that companies have expressed confusion as to the scope of the Rule. Nasdaq therefore proposes to remove these references from Rule 4340(a) and IM-4350-1 and instead refer simply to business combinations with non-Nasdaq entities resulting in a change of control.

III. Discussion and Commission Findings

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)(5) of the Act,⁸ 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.⁹

The Commission believes that the proposed rule change will provide clarity to, and eliminate any ambiguity over, the scope of application of Nasdaq Rule 4340. In particular, the revised rule language will make clear that an issuer must satisfy the initial listing requirements whenever it enters into any transaction with a non-Nasdaq entity, resulting in a change of control of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. The Commission notes that the Rule will continue to apply to "backdoor listings" or "reverse mergers," but that the proposed rule change will clarify that

the Rule also applies to a broader category of business combinations that result in a change of control of the issuer. The Commission believes that, in the case of any transaction resulting in such a change of control, which includes a backdoor listing, it is important for Nasdaq to ensure that the company meets all initial listing criteria and is subject to the scrutiny normally applied to issuers seeking initial listing. Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NASDAQ-2008-062) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon,

Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58435; File No. SR-NASDAQ-2008-070]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Fees and Credits for Members Using the Nasdaq Crossing Network

August 27, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on August 15, 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 Nasdaq. Pursuant to Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. This rule proposal, which is effective upon filing with the

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 42848 (July 17, 2008), 73 FR 42848.

⁴ Specifically, the rule provides that, in determining whether a Reverse Merger has occurred, Nasdaq will consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer, as well as the nature of the businesses and relative size of the Nasdaq issuer and non-Nasdaq entity. Securities Exchange Act Release No. 44067 (March 13, 2001), 66 FR 15515 (March 19, 2001) (SR-NASD-01-01).

⁵ Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (SR-NAS-93-07).

⁶ See, e.g., Decision 2002/2003-9 of the Nasdaq Listing and Hearing Review Council (December 2002), available at: <http://www.nasdaq.com/about/NLHRCDecisions20022003.pdf>.

⁷ See Nasdaq IM-4350-1, footnote 4.

⁸ 15 U.S.C. 78f(b)(5).

⁹ 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).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

Commission, shall become operative on September 1, 2008.

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 the [sic] Substance of the Proposed Rule Change

Nasdaq is adopting a fee and credit schedule for the Nasdaq Crossing Network.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets [sic].⁵

7018. Nasdaq Market Center Order Execution and Routing

(a)–(e) No change.

(f) *Crossing Network*

All orders executed in the Nasdaq Crossing Network	No charge for execution
Credit for eligible executions through the Crossing Network from September 1, 2008 through September 30, 2008.	\$0.0010 per share

For the purposes of this subsection "eligible executions" are all executions of trades through the Nasdaq Crossing Network other than those executions that have the same market participant on both sides of the trade.

(f)–(h) Current subsections (f) through (h) will be renumbered as (g) through (i) without other modification.

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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 and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Nasdaq is adopting a fee and credit schedule for the Nasdaq Crossing

Network. The Commission approved the Nasdaq Crossing Network on July 5, 2006.⁶ The Nasdaq Crossing Network provides an execution option to market participants trading in Nasdaq and other exchange-listed securities that facilitates the execution of block trades quickly and anonymously, while minimizing market impact and associated price movements. The Nasdaq Crossing Network consists of a series of trading day ("Intraday") and after hours ("Post-Close") Reference Price Crosses.

Since Nasdaq launched the Crossing Network, Nasdaq has not charged a fee to members for executing orders through the Intraday or Post-Close Crosses. Under the rule change, although there will continue to be no fee associated with trading through the Crossing Network, member firms will be eligible for a credit of \$0.0010 per share for orders executed through the Crossing Network during the month of September. The credit will not be subject to volume or use requirements. Trades that involve the same market participant on both sides of the transaction, however, will not be eligible for the credit.

After the expiration of the promotional pricing on September 30, 2008, order executions through the Crossing Network will continue to be offered to members at no charge.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general, and with Section 6(b)(4) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls. The promotional pricing for the Crossing Network is an equitable allocation of fees because the credit will apply equally to all members who execute orders through the Crossing Network. Furthermore, the credit is reasonable because it is intended to encourage participation in the Crossing Network, which would provide additional data to Nasdaq to evaluate the need for any

⁶ See Securities Exchange Act Release No. 54248 (July 31, 2006) (SR-NASDAQ-2006-019). Prior to the effective date of Nasdaq's operation as an exchange for Nasdaq-listed securities, the rule governing the Nasdaq Crossing Network had been approved as an NASD rule (NASD Rule 4716). Securities Exchange Act Release No. 54101 (July 5, 2006), 71 FR 39382 (July 12, 2006) (SR-NASD-2005-140).

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(4).

future changes to the product or the relevant fee schedule.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and subparagraph (f)(2) of Rule 19b-4 thereunder.¹⁰

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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. Please include File Number SR-NASDAQ-2008-070 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-2008-070. 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

⁵ Changes are marked to the rule text that appears in the electronic Nasdaq Manual found at <http://nasdaq.complinet.com>.

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

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 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the self-regulatory organization. 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-2008-070, and should be submitted on or before September 25, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58440; File No. SR-NASDAQ-2008-071]

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

August 28, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 20, 2008, The NASDAQ Stock Market LLC ("Nasdaq" 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 by Nasdaq. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposal on an accelerated basis.

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

Proposed new language is italicized; proposed deletions are in brackets.³

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4420. Quantitative Listing Criteria

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(a)-(i) No Change.
(j) Index Fund Shares
(1) No Change
(A) No Change
(B)(i) The term "Index Fund Share" includes a security issued by an open-end management investment company that seeks to provide investment results that either exceed the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple or that correspond to the inverse (opposite) of the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple. Such a security is issued in a specified aggregate number in return for a deposit of a specified number of shares of stock, a specified portfolio of fixed income securities or a combination of the above and/or cash as defined in subparagraph (1)(B)(ii) of this rule with a value equal to the next determined net asset value. When aggregated in the same specified minimum number, Index Fund Shares may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock, fixed income securities or a combination thereof and/or cash with a

value equal to the next determined net asset value.

(ii) In order to achieve the investment result that it seeks to provide, such an investment company may hold a combination of financial instruments, including, but not limited to, stock index futures contracts; options on futures contracts; options on securities and indices; equity caps, collars and floors; swap agreements; forward contracts; repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), but only to the extent and in the amounts or percentages as set forth in the registration statement for such Index Fund Shares.

(iii) Any open-end management investment company which issues Index Fund Shares referenced in this subparagraph (1)(B) that seeks to provide investment results, before fees and expenses, in an amount that exceeds - 200% of the percentage performance on a given day of a particular domestic equity, international or global equity or fixed income securities index or a combination thereof shall not be approved by the Exchange for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934.

(iv) For the initial and continued listing of a series of Index Fund Shares referenced in the provisions of this subparagraph (1)(B) of this rule, the following requirements must be adhered to:

Daily public Web site disclosure of portfolio holdings that will form the basis for the calculation of the net asset value by the issuer of such series, including, as applicable, the following instruments:

- The identity and number of shares held of each specific equity security;
- The identity and amount held for each specific fixed income security;
- The specific types of Financial Instruments and characteristics of such Financial Instruments; and
- Cash equivalents and the amount of cash held in the portfolio.

If the Exchange becomes aware that the net asset value related to an Index Fund Shares included in the provisions of this subparagraph (1)(B)(ii) of this rule, is not being disseminated to all market participants at the same time or the daily public Web site disclosure of portfolio holdings does not occur, the Exchange shall halt trading in such series of Index Fund Share, as appropriate. The Exchange may resume trading in such Index Fund Shares only when the net asset value is disseminated to all market participants at the same time or the daily public Web site

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.cchwallstreet.com>.