

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The proposed information collection request may be viewed on the Internet by accessing the MSHA home page

(<http://www.msha.gov>), selecting "Statutory and Regulatory Information," then "Paperwork Reduction Act Submission," or by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice for a hard copy of this request.

**III. Current Actions**

Inspection records denote any hazards that were discovered and how the hazards or unsafe conditions were abated. Federal inspectors use the records to ensure that unsafe conditions are identified early and corrected.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to the Safety Defects, Examination, Correction, and Records.

*Type of Review:* Extension.

*Agency:* Mine Safety and Health Administration.

*Title:* Safety Defects; Examination, Correction and Records.

*OMB Number:* 1219-0089.

*Number of Respondents:* 12,163.

Cite/Reference	Annual responses	Frequency	Average response time	Annual burden hours
30 CFR 56/57.13015 .....	3,238	Annually .....	0.17	540
30 CFR 56/57.13030 .....	488	Annually .....	0.17	81
30 CFR 56/57.14100 .....	8,999,857	Per shift .....	0.08	719,989
30 CFR 56/57.18002 .....	2,438,987	Per shift .....	0.20	487,797
<b>Grand Total:</b> .....	<b>11,442,570</b>	.....	.....	<b>1,208,407</b>

*Total Burden Cost (Operating/Maintaining):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated in Arlington, Virginia, this 12th day of March, 2004.

**David L. Meyer,**

*Director, Office of Administration and Management.*

[FR Doc. 04-6179 Filed 3-18-04; 8:45 am]

**BILLING CODE 4510-43-P**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice (04-045)]

**Return to Flight Task Group; Meeting**

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the Return to Flight Task Group (RTF TG).

**DATES:** Friday, April 16, 2004, from 8 a.m. until 11 a.m.

**ADDRESSES:** Webster Civic Center, 311 Pennsylvania, Webster, TX 77598.

**FOR FURTHER INFORMATION CONTACT:** Mr. David M. Lengyel at (281) 792-7523.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up

to the seating capacity of the meeting room. Attendees will be requested to sign a register.

The agenda for the meeting is as follows:

- Welcome remarks from Co-Chair
- Status reports from Technical, Operations, and Management Panel Chairs on NASA's implementation of all Columbia Accident Investigation Board return to flight findings/recommendations
- Remarks from the Integrated Vehicle Assessment Sub-Panel
- Remarks from Editorial Sub-Panel
- Action item summary from Executive Secretary
- Closing remarks from Co-Chair

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

**Michael F. O'Brien,**

*Assistant Administrator for External Relations, National Aeronautics and Space Administration.*

[FR Doc. 04-6193 Filed 3-18-04; 8:45 am]

**BILLING CODE 7510-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 26386; 812-13017]

**BLDRS Index Funds Trust, et al.; Notice of Application**

March 15, 2004.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application for an order under section 12(d)(1)(f) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 12(d)(1)(A) and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

*Summary of the Application:* The order would permit certain registered management investment companies and unit investment trusts to acquire shares of certain registered unit investment trusts that operate as exchange-traded funds and are outside the same group of investment companies. The order also would amend two prior orders.

*Applicants:* BLDRS Index Funds Trust ("BLDRS Trust"), Nasdaq-100 Trust, Series 1 ("Nasdaq-100 Trust"), and Nasdaq Financial Products Services, Inc. ("NFPS").

*Filing Dates:* The application was filed on September 11, 2003, and amended on March 4, 2004.

*Hearing or Notification of Hearing:* An order granting the application 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 April 8, 2004, 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, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Nasdaq Financial Products Services, Inc., The Nasdaq Stock Market, 9513 Key West Avenue, Rockville, MD 20850.

**FOR FURTHER INFORMATION CONTACT:** Stacy L. Fuller, Senior Counsel, and Michael W. Mundt, Senior Special Counsel, at (202) 942-0564 (Office of Investment Company Regulation, Division of Investment Management).

**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, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. 202-942-8090).

#### Applicants' Representations:

1. BLDRS Trust and Nasdaq-100 Trust (together, the "Trusts") are unit investment trusts organized under New York law and registered under the Act. BLDRS Trust is comprised of separate series ("BLDRS Index Funds"). The BLDRS Index Funds and the Nasdaq-100 Trust (together, the "NFPS ETFs") seek to provide investment results that correspond generally, before fees and expenses, to the price and yield performance of specified benchmark indices ("Indices" or "Benchmark Indices"). The NFPS ETFs operate as exchange-traded funds ("ETFs"). NFPS is the sponsor of each NFPS ETF.

2. Applicants request relief to permit registered management investment companies and unit investment trusts to acquire shares of the Nasdaq-100 Trust ("Nasdaq-100 Shares") and of the BLDRS Index Funds ("Trust Shares," and together with Nasdaq-100 Shares, "Units") beyond the limitations in section 12(d)(1)(A). To the extent that an Investing Fund (as defined below) owns 5% or more of the Units of an NFPS ETF, applicants further request relief from sections 17(a)(1) and (2) of the Act to permit such an NFPS ETF, as an affiliated person of the Investing Fund, to sell Units to, and redeem Units from, the Investing Fund. Applicants request that the relief apply to (i) Nasdaq-100 Trust; (ii) BLDRS Trust and each registered unit investment trust that operates as an ETF, is currently or subsequently part of the same "group of investment companies" as BLDRS Trust within the meaning of section 12(d)(1)(G)(ii) of the Act, and is sponsored by NFPS or an entity controlling, controlled by or under common control with NFPS (included

in the defined term "NFPS ETFs"); and (iii) registered management investment companies ("Investing Management Companies") and unit investment trusts ("Investing Trusts") that are not sponsored or advised by NFPS or an entity controlling, controlled by, or under common control with NFPS and that are not part of the same "group of investment companies" as the Trusts within the meaning of section 12(d)(1)(G)(ii) of the Act. Investing Management Companies and Investing Trusts are collectively referred to as "Investing Funds."<sup>1</sup> Investing Trusts do not include NFPS ETFs. Each Investing Management Company will be advised by an investment adviser that is registered under the Advisers Act or exempt from registration ("Advisor") and may be advised by investment adviser(s) within the meaning of section 2(a)(20)(B) of the Act (each, a "Subadviser").

3. Applicants state that the NFPS ETFs will offer the Investing Funds simple and efficient vehicles to achieve their asset allocation, diversification and other investment objectives, and to implement various investment strategies. Among other purposes, applicants assert that the NFPS ETFs provide instant and highly liquid exposure to the markets represented by each Benchmark Index and permit investors to achieve such exposure through a single transaction instead of the many transactions that might otherwise be needed to obtain comparable market exposure.

#### Applicants' Legal Analysis

##### A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public

interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) to permit the Investing Funds to acquire Units beyond the limits set forth in section 12(d)(1)(A).

3. Applicants state that the proposed arrangement and conditions will adequately address the policy concerns underlying section 12(d)(1)(A), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants state that the proposed arrangement will not result in undue influence by an Investing Fund or its affiliates over the NFPS ETFs. To limit the influence that an Investing Fund may have over an NFPS ETF, applicants propose a condition that prohibits the Advisor or a sponsor to an Investing Trust ("Sponsor") and certain affiliates from controlling (individually or in the aggregate) an NFPS ETF within the meaning of section 2(a)(9) of the Act. The condition also prohibits any Subadviser and certain affiliates from controlling (individually or in the aggregate) an NFPS ETF within the meaning of section 2(a)(9) of the Act. To limit further the potential for undue influence by the Investing Funds over the NFPS ETFs, applicants propose conditions 2, 3 and 4, stated below, to preclude an Investing Fund and its affiliated entities from taking advantage of an NFPS ETF with respect to transactions between the entities and to ensure the transactions will be on an arm's length basis.

5. As an additional assurance that an Investing Fund understands the implications of an investment by it in an NFPS ETF under the requested order, each Investing Fund and Trust will execute an agreement ("Investing Fund Agreement") stating that the board of directors or trustees ("Board") of, and the Advisor and any Subadviser to, an Investing Management Company, and the Sponsor and trustee of an Investing Trust ("Trustee"), as applicable, understand the terms and conditions of the order and agree to fulfill their responsibilities under the order.

6. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. Applicants state that because each NFPS ETF is a unit investment trust that does not charge any advisory fee, there will be no layered or duplicative advisory fees. Further, applicants note that Units are sold without sales charges, and

<sup>1</sup> All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application. An Investing Fund may rely on the requested order only to invest in NFPS ETFs and not in any other registered investment company.

applicants propose a condition that precludes any sales charges and/or service fees charged with respect to shares of an Investing Fund from exceeding the limits applicable to a fund of funds under Conduct Rule 2830 of the National Association of Securities Dealers, Inc. ("Rule 2830"). The Advisor, or Trustee or Sponsor, as applicable, of an Investing Fund also will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation received by the Advisor, or Trustee or Sponsor, or an affiliated person of the Advisor, or Trustee or Sponsor, from an NFPS ETF in connection with the investment by the Investing Fund in the NFPS ETF. Any Subadviser will waive fees otherwise payable to it by an Investing Management Company in an amount at least equal to any compensation received by the Subadviser, or its affiliate, in connection with any investment by the Investing Management Company in the NFPS ETF that is made at the direction of the Subadviser.

7. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that the NFPS ETFs will be prohibited from acquiring securities of any investment company, or company relying on section 3(c)(1) or 3(c)(7) of the Act, in excess of the limits contained in section 12(d)(1)(A). Applicants also represent that the Investing Fund Agreement will require an Investing Fund that exceeds the 5% or 10% limitation in section 12(d)(1)(A)(ii) or (iii), respectively, to disclose in its prospectus that it may invest in ETFs and to disclose, in "plain English," in its prospectus the unique characteristics of the Investing Fund investing in ETFs, including but not limited to the expense structure and any additional expenses of investing in ETFs.

#### B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3)(B) of the Act defines an "affiliated person" of another person to include any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person.

2. Applicants state that an NFPS ETF could become an affiliated person of an Investing Fund if the Investing Fund acquires 5% or more of an NFPS ETF's securities. Although applicants believe that most Investing Funds will purchase

Units in the secondary market and not directly from an NFPS ETF, an Investing Fund might seek to transact directly with an NFPS ETF.<sup>2</sup> Section 17(a) could prevent an NFPS ETF from selling Units to, and redeeming Units from, an Investing Fund that owns 5% or more of an NFPS ETF.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (i) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (ii) the proposed transaction is consistent with the policies of each registered investment company involved; and (iii) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed arrangement satisfies the standards for relief under sections 6(c) and 17(b) of the Act. Applicants state that the terms of the arrangement are fair and reasonable and do not involve overreaching. Applicants note that any consideration for the purchase or redemption of Units directly from an NFPS ETF will be based on the net asset value ("NAV") of the NFPS ETF. Applicants state that the proposed arrangement will be consistent with the policies of each Investing Fund and NFPS ETF, and with the general purposes of the Act. Applicants also believe that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

#### C. Prior Orders

1. Applicants seek to amend certain prior exemptive orders ("Prior Orders").<sup>3</sup> Specifically, applicants seek to amend condition 2 to each of the Prior Orders so that it is consistent with the relief being requested from section

<sup>2</sup> Units are only purchased and redeemed directly from an NFPS ETF in large blocks (e.g., 50,000 Units) called "creation units."

<sup>3</sup> The Prior Orders are BLDERS Index Funds Trust, *et al.*, Investment Company Act Release Nos. 25772 (Oct. 17, 2002) (notice) and 25797 (Nov. 8, 2002) (order) and Nasdaq-100 Trust Series 1, *et al.*, Investment Company Act Release Nos. 23668 (Jan. 27, 1999) (notice) and 23702 (Feb. 22, 1999) (order).

12(d)(1). Condition 2 currently provides that each NFPS ETF prospectus and Product Description<sup>4</sup> will clearly disclose that, for purposes of the Act, Units are issued by the NFPS ETF and that the acquisition of Units by investment companies is subject to the restrictions of section 12(d)(1) of the Act. Under new condition 2, Investing Funds will be alerted that they may invest in the NFPS ETFs in excess of the limits of section 12(d)(1) to the extent that they comply with the terms and conditions of the requested order granting relief from section 12(d)(1), including the requirement that they enter into an Investing Fund Agreement with the NFPS ETF regarding the terms of the investment. Applicants will replace current condition 2 in BLDERS Trust's Prior Order with condition 9, as stated below, and in Nasdaq-100 Trust's Prior Order with condition 12, as stated below.

2. Applicants also seek to amend the defined term "Business Day" in each of the Prior Orders to mean any day that The Nasdaq Stock Market, Inc. is open for business or that the relevant NFPS ETF is open for business as required by section 22(e) of the Act. In connection with the amendment to the defined term "Business Day," applicants seek to replace conditions 4 and 5, respectively, of BLDERS Trust's Prior Order with conditions 10 and 11, as stated below. Applicants also seek to add to Nasdaq-100 Trust's Prior Order new conditions 3 and 4, respectively, as stated in conditions 13 and 14 below.

#### Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. (a) The Advisor or Sponsor, (b) any person controlling, controlled by, or under common control with an Advisor or Sponsor, and (c) any investment company and any issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised by an Advisor or sponsored by a Sponsor, or any person controlling, controlled by, or under common control with an Advisor or Sponsor (together, the "Investing Fund's Advisory Group") will not control (individually or in the aggregate) an NFPS ETF within the meaning of section 2(a)(9) of the Act. (a) Any Subadviser, (b) any person controlling, controlled by, or under common control with the Subadviser, and (c) any investment company or issuer that would be an investment

<sup>4</sup> A "Product Description" is a document that accompanies secondary market trades of Units and provides a plain English overview of a Trust.

company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) that is advised by the Subadviser or any person controlling, controlled by, or under common control with the Subadviser (together, the "Investing Fund's Subadvisory Group") will not control (individually or in the aggregate) an NFPS ETF within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding Units of an NFPS ETF, an Investing Fund's Advisory Group or an Investing Fund's Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding Units of an NFPS ETF, it will vote its Units in the same proportion as the vote of all other Unitholders.

2. An Investing Fund and its Advisor and any Subadviser, Sponsor, promoter, and principal underwriter, and any person controlling, controlled by, or under common control with any of those entities (each, an "Investing Fund Affiliate") will not cause any existing or potential investment by the Investing Fund in an NFPS ETF to influence the terms of any services or transactions between the Investing Fund or an Investing Fund Affiliate and an NFPS ETF or the promoter, sponsor or principal underwriter of an NFPS ETF, and any person controlling, controlled by, or under common control with any of those entities (each, an "NFPS ETF Affiliate").

3. The Board, including a majority of the directors or trustees who are not interested persons (as defined in section 2(a)(19) of the Act) of the Investing Management Company, will adopt procedures reasonably designed to assure that the Advisor and any Subadviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from an NFPS ETF or an NFPS ETF Affiliate in connection with any services or transactions.

4. No Investing Fund or Investing Fund Affiliate will cause an NFPS ETF to purchase a security from any underwriting or selling syndicate in which a principal underwriter is an officer, director, member of an advisory board, investment adviser, employee or sponsor of the Investing Fund, or a person of which any such officer, director, member of an advisory board, investment adviser, employee or sponsor is an affiliated person.

5. Before investing in an NFPS ETF in excess of the limits in section 12(d)(1)(A), each Investing Fund and

Trust will execute an Investing Fund Agreement stating, without limitation, that the Board of, and the Advisor and any Subadviser to, an Investing Management Company, or the Trustee and Sponsor of an Investing Trust, as applicable, understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. The NFPS ETFs and the Investing Fund will maintain and preserve a copy of the order and the agreement for a period of not less than six years from the end of the fiscal year in which any investment occurred, the first two years in an easily accessible place.

6. An Advisor, or a Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by an Investing Fund in an amount at least equal to any compensation received by the Advisor, or Trustee or Sponsor, or an affiliated person of the Advisor, or Trustee or Sponsor, from an NFPS ETF in connection with the investment by the Investing Fund in the NFPS ETF. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, in connection with any investment by the Investing Management Company in the NFPS ETF made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

7. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in Rule 2830.

8. An NFPS ETF will not acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act.

#### **Amendments to BLDRS Trust's Prior Order**

Applicants agree to replace condition 2 of BLDRS Trust's Prior Order with the following condition:

9. Each Trust's prospectus and Product Description will clearly disclose that, for purposes of the Act, Trust Shares are issued by a registered investment company, and the acquisition of Trust Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in Trust Shares beyond the limits in section

12(d)(1)(A), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the Trust regarding the terms of the investment.

Applicants agree to replace condition 4 of BLDRS Trust's Prior Order with the following condition:

10. The Web site for the Trusts, which will be publicly accessible at no charge, will contain the following information, on a per Trust Share basis, for each Trust: (a) the prior Business Day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition, the Product Description for each Trust will state that the Web site for the Trusts has information about the premiums and discounts at which the Trust Shares have traded.

Applicants agree to replace condition 5 of BLDRS Trust's Prior Order with the following condition:

11. The prospectus and annual report for each Trust will also include: (a) the information listed in condition 4(b) above, (i) in the case of the prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable), and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Trust Share basis for one, five and ten year periods (or life of the Trust), (i) the cumulative total return and the average annual total return based on NAV and closing price, and (ii) the cumulative total return of the relevant Benchmark Index.

#### **Amendments to Nasdaq-100 Trust's Prior Order**

Applicants agree to replace condition 2 of Nasdaq-100 Trust's Prior Order with the following condition:

12. The Trust's prospectus and Product Description will clearly disclose that, for purposes of the Act, Nasdaq-100 Shares are issued by a registered investment company, and the acquisition of Nasdaq-100 Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in Nasdaq-100 Shares beyond the limits in section 12(d)(1)(A), subject to certain terms and conditions, including that the registered investment company enter

into an agreement with the Trust regarding the terms of the investment.

Applicants agree to add the following condition to Nasdaq-100 Trust's Prior Order as condition 3:

13. The Web site for the Trust or the Web site of the American Stock Exchange, each of which will be publicly accessible at no charge, will contain the following information, on a per Nasdaq-100 Share basis, for the Trust: (a) the prior Business Day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition, the Product Description for the Trust will state that the relevant Web site has information about the premiums and discounts at which the Nasdaq-100 Shares have traded.

Applicants agree to add the following condition to Nasdaq-100 Trust's Prior Order as condition 4:

14. The prospectus and annual report for the Trust will also include: (a) the information listed in condition 3(b) above, (i) in the case of the prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Nasdaq-100 Share basis for one, five and ten year periods (or life of the Trust), (i) the cumulative total return and the average annual total return based on NAV and closing price and (ii) the cumulative total return of the Index.

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

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 04-6188 Filed 3-18-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 35-27813]

### Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

March 12, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules

promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by April 5, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549-0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After April 5, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

#### **Allegheny Energy, Inc. (70-10201)**

##### *Notice of Proposed Amendments to Charter and Bylaws; Order Authorizing Solicitation of Proxies*

Allegheny Energy, Inc. ("Allegheny"), a Maryland corporation and a registered holding company under the Act, 10435 Downsville Pike, Hagerstown, Maryland 21740, has filed this declaration ("Declaration") under sections 6(a) and 12(e) of the Act and rules 62 and 65 under the Act.

Allegheny requests authority to: (1) Amend its charter to eliminate the requirement of cumulative voting in the election of directors; (2) require simple majority voting on all matters to be submitted for stockholder approval and, specifically, to (a) amend its bylaws or Charter to opt out of the Maryland Control Share Acquisition Act, (b) institute a simple majority vote of stockholders for removal of directors, and (c) eliminate the application of provisions of the Maryland Business Combination Act to the extent these provisions require super-majority approval of certain business combinations; (3) declassify the Board of Directors (items (1) through (3) are referred to below as the "Proposed Amendments"), and (4) solicit proxies in connection with (a) the implementation of the Proposed Amendments, (b) a stockholder proposal

to make the adoption or extension of any stockholder rights agreement (poison pill) subject to a stockholder vote, and (c) other routine matters and certain stockholder proposals.

#### I. Requested Authority

The Proposed Amendments cover a number of matters related to stockholder rights that have been proposed by Allegheny's management or stockholders and all of which will be submitted for stockholder approval at Allegheny's 2004 annual meeting of stockholders. Specifically, the Proposed Amendments include:

A. *Elimination of Cumulative Voting.* The Allegheny Board of Directors ("Board") has approved for submission to stockholders an amendment to Article VII.A of Allegheny's Articles of Restatement of Charter of the Company ("Charter") that would eliminate the requirement of cumulative voting in the election of directors. The Charter currently provides that in the election of directors, each holder of shares of stock entitled to vote shall be entitled to as many votes as shall equal the number of shares of stock held multiplied by the number of directors to be elected. The stockholder may cast all of these votes for a single director or may distribute them among the number of directors to be elected or any two or more of them as the stockholder may see fit. The Maryland General Corporation Law does not require cumulative voting in elections of directors.

The Board believes that the benefits of cumulative voting are much less relevant today than they were when cumulative voting was originally included in the Charter. At that time, minority stockholders had few federal and state remedies to protect them from overreaching by majority stockholders and, therefore, had a greater need for board representation. Today, the Board believes that the disadvantages of cumulative voting outweigh the advantages for large, extensively regulated and widely held companies. Cumulative voting may allow a minority of stockholders to obtain representation on the Board against the wishes of the majority. Allegheny states that for the Board to work effectively for all of the stockholders, each director should feel a responsibility to the stockholders as a whole and not to any special group of minority stockholders. If the proposed amendment is passed and cumulative voting is eliminated, Allegheny maintains that the holders of a majority of shares entitled to vote in an election of directors will be able to elect all of the directors being elected at that time, and no director will be elected by any