

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. The Commission notes that the Exchange will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Additionally, if it becomes aware that the NAV or the Disclosed Portfolio is not disseminated daily to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants. Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.<sup>11</sup> The Exchange represents that the Manager has implemented a “fire wall” between it and its broker-dealer affiliate with respect to access to information concerning the composition and/or changes to the Fund’s portfolio.<sup>12</sup> Finally, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.<sup>13</sup>

The Exchange has represented that the Shares are equity securities subject to the Exchange’s rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange’s surveillance procedures are adequate to properly monitor Exchange trading of the Shares

<sup>11</sup> Trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

<sup>12</sup> The Exchange also represents that ABA, the Fund’s primary sub-adviser, is not affiliated with a broker-dealer, and that any additional Fund sub-advisers that are affiliated with a broker-dealer will be required to implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio.

<sup>13</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Fund will be in compliance with Rule 10A-3 under the Act.<sup>14</sup>

(5) The Fund will not purchase or sell securities in markets outside the United States.

This approval order is based on the Exchange’s representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>15</sup> and the rules and regulations thereunder applicable to a national securities exchange.

### III. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> for approving the proposal prior to the thirtieth day after the date of publication of the Notice in the **Federal Register**. The Commission notes that it has approved the listing and trading on the Exchange of shares of other actively managed exchange-traded funds based on a portfolio of securities, the characteristics of which are similar to those to be invested by the Fund.<sup>17</sup> The

<sup>14</sup> See *supra* note 6.

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

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> See, e.g., Securities Exchange Act Release Nos. 58512 (September 11, 2008), 73 FR 53915 (September 17, 2008) (SR-NYSEArca-2008-85) (approving the listing and trading of shares of the PowerShares Active U.S. Real Estate Fund); and 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving the listing and trading of shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, and PowerShares Active Mega-Cap Portfolio, among other funds).

Commission also notes that it has received no comments regarding the proposed rule change. The Commission finds that the proposed rule change does not raise any novel regulatory issues and believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for Managed Fund Shares.

### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NYSEArca-2009-22) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59821; File No. SR-DTC-2009-05]

### Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change Relating to Expanding the Scope and Timing To Collect and Pass-Through Fees Owed by Participants to American Depository Receipt Agents

April 24, 2009.

#### I. Introduction

On February 25, 2009, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).<sup>1</sup> On March 16, 2009, the Commission published notice of the proposed rule change in the **Federal Register** to solicit comments from interested persons.<sup>2</sup> The Commission received no comment letters in response to the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

#### II. Description

Prior to this rule change, DTC collected custody fees, called Depository Service Fees (“DSF”), from

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 59540 (Mar. 9, 2009), 74 FR 11146.

participants once a year per CUSIP. DTC collected DSFs at the request of the depository bank and only for issues that have not paid a dividend in the last 12 months. In addition to collecting the DSF, DTC charged its participants three percent (3%) of the ADR agent fee, which includes all fees under the ADR agreement, up to a maximum of \$10,000 per CUSIP ("collection charge") in order to cover costs incurred in collecting and passing through DSFs.<sup>3</sup>

With this rule filing, DTC will collect all allowable DSFs, dividend fees,<sup>4</sup> pass-through expenses, or other special fees as governed by the ADR agreement.<sup>5</sup> Additionally, DTC will increase the maximum collection charge to \$20,000 per CUSIP. In order to collect the ADR agent fees, the ADR depository banks will be required to notify DTC thirty calendar days prior to the record date that a DSF or other fee is due and payable.<sup>6</sup> Moreover, DTC will require that the ADR depository bank submit an attestation that the specific fee(s) is (are) allowable under the ADR agreement with the issuer. The attestation will be in a form prescribed by DTC and may be changed periodically to address operational issues. If a participant asks DTC to substantiate the fee, DTC may require the ADR depository to provide DTC with a copy of the ADR agreement with the issuer and highlight the fee schedule. DTC may at its discretion provide copies of the agreement to its participants to substantiate the fee.

As a result of this rule filing, the fee schedule for assessing ADR agent fees will be revised. First, ADR agent fees will apply to all fees permitted under the ADR agreement; the reference to "issues not paying periodic dividends" would be deleted. Second, as discussed above, the maximum ADR agent fee that DTC would collect would be increased to \$20,000 from \$10,000.

DTC expects to begin collecting ADR agent fees as expanded by this rule filing in the first full month following the approval of this filing.

<sup>3</sup> See Securities Exchange Release Act No. 55306 (Feb. 15, 2007) 72 FR 8217 (Feb. 23, 2007) (File No. SR-DTC-2006-21) (modifying the fees from the original filing).

<sup>4</sup> Dividend fees will continue to be collected through the current rate adjustment process. The dividend fee is incorporated into the final rate paid on the dividend by the agent on payment date and covers their cost for servicing the dividend payment.

<sup>5</sup> ADR agreements are filed with the Commission and are usually posted on the depository bank's Web site.

<sup>6</sup> Fees may be collected multiple times in any given calendar year depending on the terms of the ADR agreement.

### III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC. In particular, the Commission believes the proposal is consistent with Section 17A(b)(3)(F) of the Act,<sup>7</sup> which requires that the rules of a registered clearing agency are designed to, among other things, remove impediments to the perfection of the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. For example, further automating and centralizing information to effect DTC's ADR agent fee collection process should eliminate invoice and check processing for DTC participants and depository banks because ADR depositories will no longer have to mail invoices and reminders to participants holding ADR securities at DTC. In addition, DTC participants will have a more transparent view into upcoming ADR agent fees and a centralized source for information about the ADR agent fee and the collection process. These refinements to the ADR fee collection process should therefore remove impediments to the perfection of the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act<sup>8</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (File No. SR-DTC-2009-05) be and hereby is approved.<sup>10</sup>

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

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>7</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>8</sup> 15 U.S.C. 78q-1.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59822; File No. SR-NASDAQ-2009-034]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Modifying Rule 7050 Governing Pricing for The NASDAQ Options Market ("NOM")

April 27, 2009.

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 April 9, 2009, 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. Nasdaq has filed this proposal pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> [sic] Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge applicable only to members, which renders the proposed rule change effective upon filing. The Commission is publishing this notice and [sic] order 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 has filed a proposed rule change to modify Rule 7050 governing pricing for Nasdaq members using the NASDAQ Options Market ("NOM"), Nasdaq's facility for executing and routing standardized equity and index options. Proposed new language is underlined [sic]; proposed deletions are in brackets.<sup>5</sup>

\* \* \* \* \*

#### 7050. NASDAQ Options Market

The following charges shall apply to the use of the order execution and routing services of the NASDAQ Options Market for all securities.

##### (1) Fees for Execution of Contracts on the NASDAQ Options Market

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.