

Act<sup>16</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>17</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that under the proposal, the Exchange's disseminated size should accurately reflect revised quotation sizes based on automatic executions through Phlx XL in real time. Accordingly, the Commission designates that the proposed rule change become operative immediately.<sup>18</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2008-66 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-Phlx-2008-66. 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](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 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of Phlx. 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-Phlx-2008-66 and should be submitted on or before October 15, 2008.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58569; File No. SR-NASDAQ-2008-033]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendment Nos. 1 and 2 Related to Submission of Non-Tape Reports

September 17, 2008.

#### I. Introduction

On April 18, 2008, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change related to submission of non-tape reports. On July 3, 2008, Nasdaq filed Amendment No. 1 to the proposed rule change. The

proposed rule change was published for comment in the **Federal Register** on July 11, 2008.<sup>3</sup> Two comments were received in support of the proposed rule change.<sup>4</sup> On August 11, 2008, Nasdaq filed Amendment No. 2 to the proposed rule change to make certain technical, non-substantive modifications to the original rule filing. This order approves the proposed rule change, as amended.

#### II. Description of the Proposal

*The proposed rule change would:* Expand the scope of step-outs<sup>5</sup> to include all securities transfers from one Nasdaq member to another provided the transfer does not constitute a reportable trade,<sup>6</sup> eliminate the requirement for an authorizing agreement when Nasdaq members use the Automated Confirmation Transaction service ("ACT") to effect a step-out along with the transfer of a sales fee or similar fee,<sup>7</sup> describe riskless transactions,<sup>8</sup> state that members may not use the step-out function in lieu of reporting a trade,<sup>9</sup> and establish a fee for the use of the step-out function to transfer a transaction fee.<sup>10</sup>

Nasdaq will allow members to submit records for riskless transfers using the following capacities: "Riskless Principal" where the member acted as principal on the trade or trades related to the riskless submission; "Agent" where the member acted as agent on the trade or trades related to the riskless submission; and "Intra-Broker" where the transfer is occurring strictly within a member firm.

##### Transaction Fees

According to Nasdaq, trade reporting rules of other SROs allow transaction fees to be included in clearing reports. Nasdaq proposes to permit members to include transaction fees in clearing reports submitted under Rule 7038 or 7042, if the members agree in advance to transfer the transaction fee and if they are parties to a written agreement

<sup>3</sup> See Securities Exchange Act Release No. 58101 (July 3, 2008), 73 FR 40002.

<sup>4</sup> See e-mail from Kirk Allen, Managing Director, Trading, NWQ Investment Management, dated August 1, 2008 ("NWQ Investment Letter") and letter from William D. Edick, Pickard and Djinis LLP, to Florence E. Harmon, Acting Secretary, Commission, dated September 11, 2008 ("Pickard Letter").

<sup>5</sup> Nasdaq states that a step-out is a clearing entry used to transfer a broker's position in a security to another broker, or within accounts at a firm.

<sup>6</sup> Rule 7038(b).

<sup>7</sup> Rule 7038(c).

<sup>8</sup> Rule 7042. Nasdaq states that this requirement follows the general standard for riskless principal transactions articulated in Financial Industry Regulatory Authority ("FINRA") Rule 4632(d)(3)(B).

<sup>9</sup> Rule 7038(d), 7042(b) and 7043(a).

<sup>10</sup> Rule 7043.

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>18</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

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

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

permitting the submission of fee-inclusive clearing reports. Nasdaq would allow members to transfer to another Nasdaq member transaction fees using the clearing reports that Nasdaq forwards to the National Securities Clearing Corporation ("NSCC") to clear a trade. Nasdaq will impose a fee of \$0.03 per-side for each such clearing report.<sup>11</sup>

#### Step-Outs

A step-out is a transfer of all or a portion of a broker-dealer's securities position to another broker-dealer which transfer does not constitute a trade. According to Nasdaq, this proposal builds upon previous attempts to provide step-out parameters for its members. Nasdaq initially offered step-out capability in 2007 because FINRA rules restricted the use of step-outs to those portions of trades that were originally executed by, and reported to, FINRA facilities.<sup>12</sup> Certain broker-dealers wished to engage in step-outs but did not have systems in place to capture the venue of the original trade execution and/or they may have executed various portions of the underlying trade in non-FINRA facilities. FINRA rules do not permit the use of step-outs under these conditions. Accordingly, Nasdaq amended its rules to allow the use of step-outs in connection with any trade to which a Nasdaq member was a party regardless of the market on which the trade was executed.<sup>13</sup>

Nasdaq amended its step-out rules again in 2007 to require clearing member firms that wanted to transfer certain sales fees without transferring the underlying shares to have an authorizing agreement. No authorizing agreement is required when Nasdaq members conduct step-outs if the transfers are limited to transfer of the underlying shares.<sup>14</sup>

Nasdaq is again expanding its step-out parameters: first, it proposes to expand the scope of step-outs to include all securities transfers from one Nasdaq member to another provided that the transfer does not constitute a reportable trade; second, Nasdaq is eliminating the requirement for an authorizing agreement when Nasdaq members use

ACT to effect a step-out along with the transfer of a sales or similar fee.<sup>15</sup> Third, Nasdaq is reiterating in its rules that step-outs are not trade reports and cannot be used as such and reminding members of the need to comply with trade reporting rules of other SROs governing a particular transaction.<sup>16</sup> Finally, Nasdaq is implementing a fee for step-outs that also transfer a transaction fee.

Nasdaq believes that the above changes will enhance the ability of Nasdaq members to transfer securities positions and their associated fees in an efficient and transparent manner.

### III. Discussion and Commission Findings

After careful consideration, 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<sup>17</sup> and, in particular, the requirements of Section 6 of the Act.<sup>18</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>19</sup> 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 foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Nasdaq's proposal to expand the use of step-outs, as described above should enhance the

efficiency and transparency to members of their post-trade operations.

The Commission received two comment letters on the proposed rule change.<sup>20</sup> One commenter expressed support for Nasdaq's proposal and stated it believes Nasdaq's proposal will bring added transparency.<sup>21</sup> The other commenter questioned the impact this proposed rule change may have on Exchange Act Rule 10b-10<sup>22</sup> disclosure requirements.<sup>23</sup>

Nasdaq's proposal to allow submission of non-tape, riskless principal reports through ACT should facilitate the transfer of information between parties to the transaction and make the trade record information electronically available. It can facilitate the ultimate transmission of the transfer records to the appropriate clearing agency.<sup>24</sup> The Commission notes that Nasdaq members can not satisfy any trade reporting obligations by submitting non-tape, clearing, or non-tape, non-clearing records to ACT. Furthermore, the Commission expects Nasdaq to monitor the expanded use of the step-out functionality to ensure that its members use these position movements as specified in the rule, and not to effect trades.

Nasdaq's proposal to allow the transfer of fees in conjunction with the step-out is analogous to rules of other SROs which allow transaction fees to be included in clearing reports.<sup>25</sup> The Commission understands that although Nasdaq no longer requires members to have agreements in place for step-out transactions, the transaction comparison process itself requires the acquiescence of both parties for the ACT system to complete the transaction. A member retains the opportunity to manually reject or reverse the step-out and fee transfer arrangement if it disagrees with their terms when the terms are presented to the member even after the

<sup>11</sup>Nasdaq states that under NASD Rule 7002B, FINRA/Nasdaq TRF participants are charged a fee of \$0.03 per side for submission of a clearing report to transfer a transaction fee charged by one FINRA member to another.

<sup>12</sup> See Securities Exchange Act Release No. 56345 (August 31, 2007), 72 FR 51880 (September 11, 2007).

<sup>13</sup> *Id.*

<sup>14</sup> See Securities Exchange Act Release No. 56929 (December 7, 2007), 72 FR 71176 (December 14, 2007).

<sup>15</sup> Nasdaq represents that step-outs are already completed pursuant to formal agreements among Nasdaq members or through ACT's comparison processes, which renders the current requirement for an authorizing agreement duplicative.

This proposed rule change would not change the requirement of a formal sales fee transfer agreement between firms that wish to use ACT to move sales fees without an accompanying transfer of securities. Nasdaq believes that it is important to retain the requirement that the parties to a fee transfer have a written agreement specifically permitting the fee transfers because a sales fee transfer that moves no shares is not a step-out and therefore there are no specific share movements for firms to readily identify as being associated with the fee transfer.

<sup>16</sup> See Rules 7038(d), 7042(b) and 7043(a).

<sup>17</sup> In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See *supra* note 4.

<sup>21</sup> See NWQ Letter, *supra* note 4.

<sup>22</sup> 17 CFR 240.10b-10.

<sup>23</sup> See Pickard Letter, *supra* note 4. The Commission believes that this comment raises an interpretive question regarding the applicability of Exchange Act Rule 10b-10 and is outside of the scope of NASDAQ's proposed rule change. Procedures applicable to requests for no-action and interpretive letters from the Division of Trading and Markets are available in Securities Act Release No. 6269 (December 5, 1980) (available at: <http://www.sec.gov/rules/other/33-6269.pdf>).

<sup>24</sup> The Commission notes that Nasdaq represents it will continue to honor Attachment 2's and Uniform Trade Reporting Agreements on file with it or the FINRA/Nasdaq TRF.

<sup>25</sup> When a firm uses this function the fee will be electronically billed and collected.

step-out and fee transfer had initially been affirmed.<sup>26</sup>

#### 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 6 of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-NASDAQ-2008-033), as modified by Amendments No. 1 and 2, be and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58564; File No. SR-NYSEArca-2008-86]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change To List and Trade the WisdomTree Dreyfus Emerging Markets Fund

September 17, 2008.

#### I. Introduction

On August 11, 2008, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to list and trade the WisdomTree Dreyfus Emerging Markets Fund (“Fund”). The proposed rule change was published for comment in the **Federal Register** on August 26, 2008.<sup>3</sup> The Commission received no comment letters on the proposal. This

<sup>26</sup> Nasdaq represents that it determined through discussions with its member firms that many firms preferred to handle step-outs on a match/compare basis, *i.e.* manually, even when they had a fee agreement between them and that it was an unnecessary burden for firms to sign separate agreements to move fees associated with step-out submissions to ACT since this functionality already was in place on ACT.

<sup>27</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58396 (August 20, 2008), 73 FR 50385 (“Notice”).

order approves the proposed rule change on an accelerated basis.

#### II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the shares (“Shares”) of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange.<sup>4</sup> The Fund will be an actively managed exchange traded fund. The Shares will be offered by the WisdomTree Trust (“Trust”), which was established as a Delaware statutory trust on December 15, 2005. The Trust is registered with the Commission as an investment company.<sup>5</sup>

##### A. Description of the Shares and the Fund

WisdomTree Asset Management, Inc. (“WisdomTree Asset Management”) is the investment adviser to the Fund.<sup>6</sup> The Exchange represents that WisdomTree Asset Management is not affiliated with any broker-dealer. The Bank of New York is the administrator, custodian, and transfer agent for the Fund. ALPS Distributors, Inc. serves as the distributor for the Fund.<sup>7</sup>

The Fund seeks to earn current income reflective of money market rates in emerging market currencies available to foreign investors, as well as provide

<sup>4</sup> Managed Fund Shares are securities that represent an interest in a registered investment company organized as an open-end management investment company or similar entity that invests in a portfolio of securities selected by such investment company’s investment adviser consistent with such investment company’s investment objectives and policies. See NYSE Arca Equities Rule 8.600(c)(1); Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving, among other things, rules permitting the listing and trading of Managed Fund Shares).

<sup>5</sup> See Post-Effective Amendment No. 14 to Registration Statement on Form N-1A for the Trust (File Nos. 333-132380 and 811-21864) (“Registration Statement”). The Exchange states that the descriptions of the Fund and the Shares contained in the Notice are based on information in the Registration Statement.

<sup>6</sup> WisdomTree Investments, Inc. is the parent company of WisdomTree Asset Management.

<sup>7</sup> The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (“1940 Act”). See Investment Company Act Release No. 28147 (February 6, 2008), 73 FR 7776 (February 11, 2008) (File No. 812-13470). In compliance with Commentary .05 to NYSE Arca Equities Rule 8.600, which applies to Managed Fund Shares based on an international or global portfolio, the Exchange states that the Trust’s application for exemptive relief under the 1940 Act provides that the Fund will comply with federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

exposure to changes in the value of emerging market currencies relative to the U.S. dollar. The Exchange notes that because the Fund’s investment objective was adopted as a non-fundamental investment policy, the Fund’s investment objective may be changed without a vote of shareholders.

The Fund seeks to achieve its investment objective by investing in short-term securities and instruments designed to provide exposure to the currencies and money market rates of a specified set of emerging market countries. The set of countries is selected and reconstituted on an annual basis with similar allocations to each country being established (in U.S. dollar terms) at the reconstitution date and consequently reset each quarter. Although the Fund is actively managed, the Exchange states that the Fund would strive to adhere to these general parameters in both currency selection and approximate allocation, unless it is believed to be to the detriment of the Fund.

A basket of from five to twelve currencies is selected at least annually from a pool of eligible currencies to provide a representative and diversified proxy for developing market currencies relative to the U.S. dollar. Countries and their capital markets are first classified as frontier, emerging, developing, and developed markets based on a number of quantitative and qualitative factors to determine eligibility. Only the currencies of countries and capital markets classified as developing or emerging markets will be deemed eligible. The selection of the constituent currencies is then driven by the liquidity and tradability of the individual currencies, a country’s economic and capital market development, and optimized regional and economic diversification. The Fund attempts to invest in instruments that provide exposure to the most liquid currencies in the geographical regions in which the Fund invests. The Fund will seek to provide an equally-weighted exposure to these currencies. The Fund will be rebalanced on a quarterly basis to maintain this equal weighting. The basket will be reconstituted each year following a similar classification and selection process. Significant events, such as the reclassification of a country’s currency from developing to developed, may cause the Fund to reconstitute its portfolio more frequently than annually. At launch, the Fund initially will select a subset of the following markets: Brazil, Chile, China, the Czech Republic, Hungary, India, Malaysia, Mexico, Poland, Russia, South