

the employee's previous marriages, if any, to determine if any impediment exists to the marriage between the employee and his or her spouse.

Additional Information or Comments:

Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer at (312-751-3363) or Charles.Mierzwa@rrb.gov.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611-2092 or Ronald.Hodapp@rrb.gov and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27051; 812-13000]

First Trust Exchange-Traded Fund, et al.; Notice of Application

August 26, 2005.

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

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 24(d) of the Act and rule 22c-1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

Summary of Application: Applicants request an order that would permit (a) Open-end management investment companies, the series of which consist of the component securities of certain domestic equity securities indexes, to issue shares ("Shares") that can be redeemed only in large aggregations ("Creation Units"); (b) secondary market transactions in Shares to occur at negotiated prices on the The Nasdaq Stock Market ("Nasdaq") or a national securities exchange, as defined in section 2(a)(26) of the Act (each, an "Other Exchange," and together with Nasdaq, the "Exchanges"); (c) dealers to sell Shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 ("Securities Act"); and (d) certain

affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units.

Applicants: First Trust Exchange-Traded Fund ("Initial Trust"); First Trust Advisors, L.P. ("Advisor"); and First Trust Portfolios, L.P. ("Distributor").

Filing Dates: The application was filed on August 12, 2003, and amended on August 23, 2005. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

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 September 19, 2005, 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, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303; Applicants, 1001 Warrenville Road, Lisle, IL 60532.

FOR FURTHER INFORMATION CONTACT: John Yoder, Attorney-Adviser, at (202) 551-6878, or Stacy Fuller, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Public Reference Desk, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-0102 (telephone (202) 551-5850).

Applicants' Representations

1. The Initial Trust is an open-end management investment company registered under the Act and organized as a Massachusetts business trust. The Initial Trust currently has one series (the "Initial Fund") and intends to establish other series ("Future Funds," and together with the Initial Fund, "Funds"). The Advisor is registered as an investment adviser under the Investment Advisers Act of 1940

("Advisers Act") and will serve as the investment adviser to the Initial Fund. The Advisor may in the future retain one or more sub-advisers ("Sub-Advisors") to manage the Funds' portfolios. Any Sub-Advisor will be registered under the Advisers Act or exempt from registration. The Distributor, a broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act"), will serve as the principal underwriter and distributor of Shares.

2. Each Fund will invest in a portfolio of equity securities ("Portfolio Securities") selected to correspond generally to the price and yield performance of a specified domestic equity securities index ("Underlying Index"). The Dow Jones Select Microcap Index is the Underlying Index for the Initial Fund. In the future, the Initial Trust may offer Future Funds and other registered open-end management investment companies ("Future Trusts," and together with the Initial Trust, "Trusts") may offer series (included in the defined term Future Funds) based on other Underlying Indexes. Any Future Fund will (a) comply with the terms and conditions of any order granted pursuant to the application and (b) be advised by the Advisor or an entity controlling, controlled by or under common control with the Advisor (included in the defined term Advisor). No entity that creates, compiles, sponsors or maintains an Underlying Index is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust, Advisor, Sub-Advisor, Distributor, or promoter of a Fund.

3. The investment objective of each Fund will be to provide investment results that generally correspond, before fees and expenses, to the price and yield performance of the Underlying Index. Intra-day values of the Underlying Index will be disseminated every 15 seconds throughout the trading day. In seeking to achieve the investment objective, each Fund will utilize either a replication or a representative sampling strategy.¹ A Fund using a replication strategy generally will invest in the component securities of the Underlying Index ("Component Securities") in the same approximate proportions as in the Underlying Index. When, for example, a

¹ A Fund will invest at least 90% of its assets in the relevant Component Securities (as defined below). A Fund may invest up to 10% of its assets in futures, options and swap contracts, cash and cash equivalents, and stocks not included in the Underlying Index but which the Advisor or Sub-Advisor believes will help the Fund track its Underlying Index.

Component Security is illiquid, or when there are practical difficulties or substantial costs involved in holding every security in an Underlying Index, a Fund may use a representative sampling strategy pursuant to which it will invest in some but not all of the relevant Component Securities.² Applicants anticipate that a Fund that utilizes a representative sampling strategy will not track the performance of its Underlying Index with the same degree of accuracy as an investment vehicle that invests in every Component Security in the same weighting as the Underlying Index. Applicants expect that each Fund will have a tracking error relative to the performance of its Underlying Index of less than 5 percent.

4. Shares of the Funds will be sold at a price of between \$40 and \$250 per Share in Creation Units of between 25,000 and 150,000 Shares. With respect to the Initial Fund, Shares will be priced at approximately \$45 and sold in Creation Units of 50,000 Shares at a total price per Creation Unit of approximately \$2,250,000. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into an agreement with the Distributor ("Authorized Participant"). An Authorized Participant must be either (a) a broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation, a clearing agency that is registered with the Commission, or (b) a participant in the Depository Trust Company ("DTC," and such participant, "DTC Participant"). Creation Units generally will be issued in exchange for an in-kind deposit of securities and cash, though a Fund may sell Creation Units on a cash-only basis in limited circumstances. An investor wishing to purchase a Creation Unit from a Fund will have to transfer to the Fund a "Portfolio Deposit" consisting of: (a) A portfolio of securities that has been selected by the Advisor or Sub-Advisor to correspond generally to the performance of the relevant Underlying Index ("Deposit Securities"), and (b) a cash payment to equalize any differences between the market value per Creation Unit of the Deposit Securities and the net asset value ("NAV") per Creation Unit ("Balancing

Amount").³ An investor purchasing a Creation Unit from a Fund will be charged a fee ("Transaction Fee") to prevent the dilution of the interests of the remaining shareholders resulting from the Fund incurring costs in connection with the purchase of the Creation Units.⁴ Each Fund will disclose the maximum Transaction Fee charged by the Fund in its prospectus ("Prospectus") and the method of calculating the Transaction Fees in its Prospectus or statement of additional information ("SAI").

5. Orders to purchase Creation Units of a Fund will be placed with the Distributor who will be responsible for transmitting orders to the Funds. The Distributor will issue confirmations of acceptance to purchasers of Creation Units and delivery instructions to the Trust (to implement the delivery of Creation Units), and will maintain records of the orders and confirmations. The Distributor will also be responsible for delivering Prospectuses to purchasers of Creation Units.

6. Persons purchasing Creation Units from a Fund may hold the Shares or sell some or all of them in the secondary market. Shares of the Funds will be listed on an Exchange, which will either be Nasdaq or an Other Exchange and traded in the secondary market in the same manner as other equity securities. It is expected that one or more members of the listing Exchange will act, with respect to Nasdaq,⁵ as a market maker ("Market Maker") or, with respect to any Other Exchange,⁶ as a specialist ("Specialist"), and maintain a market on the Exchange for the Shares. The price

³ On each day that the Trust is open for business ("Business Day"), prior to the opening of trading on the Exchange, the Advisor or Sub-Advisor will make available the list of the names and the required number of shares of each Deposit Security required for the Portfolio Deposit for the Fund. That Portfolio Deposit will apply to all purchases of Creation Units until a new Portfolio Deposit for the Fund is announced. Each Fund reserves the right to permit or require the substitution of an amount of cash in lieu of depositing some or all of the Deposit Securities in certain circumstances. The Exchange will disseminate every 15 seconds throughout the trading day via the facilities of the Consolidated Tape Association an amount representing, on a per Share basis, the sum of the current value of the Deposit Securities and the estimated Balancing Amount.

⁴ When a Fund permits a purchaser to substitute cash for Deposit Securities, the purchaser may be assessed a higher Transaction Fee to offset the brokerage and other transaction costs incurred by the Fund to purchase the requisite Deposit Securities.

⁵ The listing requirements established by Nasdaq require that at least two Market Makers be registered in Shares in order for the Shares to maintain a listing on Nasdaq. Registered Market Makers must make a continuous two-sided market in a listing or face regulatory sanctions.

⁶ Other Exchanges will assign a Specialist to make a market in Shares.

of Shares traded on an Exchange will be based on a current bid/offer market. Purchases and sales of Shares in the secondary market will be subject to customary brokerage commissions and charges.

7. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Market Maker or Specialist, in providing for a fair and orderly secondary market for Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.⁷ Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

8. Shares will not be individually redeemable. Shares will only be redeemable in Creation Units from a Fund. To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit generally will receive (a) a portfolio of securities designated to be delivered for Creation Unit redemptions on the date that the request for redemption is submitted ("Fund Securities"), which may not be identical to the Deposit Securities required to purchase Creation Units on that date, and (b) a "Cash Redemption Payment," consisting of an amount calculated in the same manner as the Balancing Amount, although the actual amount of the Cash Redemption Payment may differ from the Balancing Amount if the Fund Securities are not identical to the Deposit Securities on that day. An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

9. Applicants state that no Trust or Fund will be marketed or otherwise held out as a traditional open-end

⁷ Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting the beneficial owners of Shares.

² The stocks selected for inclusion in a Fund by the Advisor will have aggregate investment characteristics (based on market capitalization and industry weightings), fundamental characteristics (such as return variability, earnings valuation and yield) and liquidity measures similar to those of the relevant Underlying Index taken in its entirety.

investment company or mutual fund. Rather, applicants state that each Fund will be marketed as an “exchange-traded fund,” “investment company,” “fund” and “trust.” All marketing materials that refer to redeemability or describe the method of obtaining, buying or selling Shares will prominently disclose that Shares are not individually redeemable and that Shares may be acquired or redeemed from the Fund in Creation Units only. The same type of disclosure will be provided in the Prospectus, SAI, shareholder reports and investor educational materials issued or circulated in connection with Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

Applicants’ Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 24(d) of the Act and rule 22c-1 under the Act, and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that 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.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Trust to register as an open-end management investment company and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should

be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c-1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act.

Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage

activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

Section 24(d) of the Act

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company. Applicants request an exemption from section 24(d) to permit dealers selling Shares to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.⁸

8. Applicants state that Shares will be listed on an Exchange and will be traded in a manner similar to other equity securities, including the shares of closed-end investment companies. Applicants note that dealers selling shares of closed-end investment companies in the secondary market generally are not required to deliver a prospectus to the purchaser. Applicants contend that Shares, as a listed security, merit a reduction in the compliance costs and regulatory burdens resulting from the imposition of prospectus delivery obligations in the secondary market. Because Shares will be exchange-listed, prospective investors will have access to several types of market information about Shares. Applicants state that information regarding market price and volume will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. The previous day’s closing price and volume information for Shares also will be published daily in the

⁸ Applicants do not seek relief from the prospectus delivery requirement for non-secondary market transactions, such as purchases of Shares from the Fund or an underwriter. Applicants state that persons purchasing Creation Units will be cautioned in the Prospectus that some activities on their part may, depending on the circumstances, result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent Shares and sells them directly to its customers, or if it chooses to couple the purchase of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. The Prospectus will state that whether a person is an underwriter depends upon all the facts and circumstances pertaining to that person’s activities. The Prospectus also will state that dealers who are not “underwriters” but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with Shares that are part of an “unsold allotment” within the meaning of section 4(3)(C) of the Securities Act, would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

financial section of newspapers. In addition, the website maintained for each Trust will include, for each Fund, the prior Business Day's NAV, the midpoint of the bid-ask spread at the time of calculation of the NAV ("Bid-Ask Price"), a calculation of the premium or discount of the Bid-Ask Price against such NAV, and data in chart format displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.⁹

9. Investors also will receive a short product description ("Product Description"), describing a Fund and its Shares. Applicants state that, while not intended as a substitute for a Prospectus, the Product Description will contain information about Shares that is tailored to meet the needs of investors purchasing Shares in the secondary market.

Section 17(a)(1) and (2) of the Act

10. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines "affiliated person" to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. Applicants state that because the definition of "affiliated person" includes any person owning 5% or more of an issuer's outstanding voting securities, every purchaser of a Creation Unit will be affiliated with a Fund so long as fewer than twenty Creation Units are in existence, and any purchaser that owns more than 25% of a Fund's outstanding Shares will be an affiliated person of the Fund. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b), to permit persons that are affiliated persons of the Funds solely by virtue of a 5% or more, or more than 25%, ownership interest (and affiliated persons of such affiliated persons that are not otherwise affiliated with the

Funds) to purchase and redeem Creation Units through "in-kind" transactions.

11. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting the affiliated persons of a Fund described above from purchasing or redeeming Creation Units through "in-kind" transactions. The deposit procedure for in-kind purchases and the redemption procedure for in-kind redemptions will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued in the same manner as the Fund's Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons of a Fund, or the affiliated persons of such affiliated persons, described above, to effect a transaction detrimental to other holders of Shares. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Fund.

Applicants' Conditions

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

1. Applicants will not register a Future Fund by means of filing a post-effective amendment to a Trust's registration statement or by any other means, unless either (a) applicants have requested and received with respect to such Future Fund, either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission; or (b) the Future Fund will be listed on an Exchange without the need for a filing pursuant to rule 19b-4 under the Exchange Act.

2. Each Prospectus and Product Description will clearly disclose that, for purposes of the Act, Shares are issued by the Funds and that the acquisition of Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act.

3. As long as a Trust operates in reliance on the requested order, the Shares will be listed on an Exchange.

4. Neither a Trust nor any Fund will be advertised or marketed as an open-end fund or a mutual fund. Each

Prospectus will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

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

6. The Prospectus and annual report for each Fund will also include: (a) The information listed in condition 5(b), (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 Share basis for one, five and ten year periods (or life of the Fund), (i) the cumulative total return and the average annual total return based on NAV and Bid-Ask Price, and (ii) the cumulative total return of the relevant Underlying Index.

7. Before a Fund may rely on the order, the Commission will have approved, pursuant to rule 19b-4 under the Exchange Act, an Exchange rule requiring Exchange members and member organizations effecting transactions in Shares to deliver a Product Description to purchasers of Shares.

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

Margaret H. McFarland,
Deputy Secretary.

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⁹ The Bid-Ask Price per Share of a Fund is determined using the highest bid and the lowest offer on the primary listing Exchange at the time of calculation of such Fund's NAV.