

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77340; File No. SR-NYSEArca-2015-93)

March 10, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Listing and Trading of Shares of the Cumberland Municipal Bond ETF under NYSE Arca Equities Rule 8.600

I. Introduction

On November 24, 2015, NYSE Arca, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Cumberland Municipal Bond ETF (“Fund”), a series of the ETFis Series Trust I (“Trust”). The proposed rule change was published for comment in the Federal Register on December 14, 2015.<sup>3</sup> On December 29, 2015, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>4</sup> On January 21, 2016, pursuant to Section

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<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. 76590 (Dec. 8, 2015), 80 FR 77384 (“Notice”).

<sup>4</sup> In Amendment No. 1, the Exchange clarified that each Municipal Bond (as defined herein) held by the Fund must be a constituent of a deal where the deal’s original offering amount was at least \$100 million, clarified whether certain securities would be exchange-traded or over-the-counter (“OTC”), deleted a statement relating to redemption of Shares, clarified pricing information for certain assets, and corrected a typographical error. Because Amendment No. 1 to the proposed rule change is technical in nature and does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, it is not subject to notice and comment. Amendment No. 1, which amended and replaced the original proposal in its entirety, is available on the Commission’s website at: <http://www.sec.gov/comments/sr-nysearca-2015-93/nysearca201593-1.pdf>.

19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup> The Commission received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.

## II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Fund, an actively managed exchange-traded fund (“ETF”), under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund is a series of the Trust.<sup>8</sup> The investment adviser to the Fund will be Virtus ETF Advisers LLC (“Adviser”), and the Fund’s sub-adviser will be Cumberland Advisors Inc. (“Sub-Adviser”).<sup>9</sup> Virtus ETF Solutions LLC will

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<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 76955, 81 FR 4724 (Jan. 27, 2016). The Commission designated March 11, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change. See Securities Exchange Act Release No. 76955A (Mar. 2, 2016), 81 FR 12174 (Mar. 8, 2016) (correcting the date to “March 11, 2016” as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change).

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> The Exchange represents that the Trust is registered under the Investment Company Act of 1940 (“1940 Act”). On May 20, 2015, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 and under the 1940 Act relating to the Fund (File Nos. 333-187668 and 811-22819) (“Registration Statement”). The Exchange further states that the Trust has obtained certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 30607 (Jul. 23, 2013) (File No. 812-14080).

<sup>9</sup> According to the Exchange, the Adviser and Sub-Adviser are not registered as broker-dealers. The Adviser (but not the Sub-Adviser) is affiliated with one or more broker-

serve as the Fund’s operational administrator. ETF Distributors LLC will serve as the distributor of the Shares on an agency basis. The Bank of New York Mellon (“Administrator”) will serve as the administrator, custodian, transfer agent and fund accounting agent for the Fund. The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including the Fund’s portfolio holdings and investment restrictions.<sup>10</sup>

A. Exchange’s Description of the Fund’s Principal Investments

The Fund will seek to provide a competitive level of current income exempt from federal income tax, while preserving capital. The Fund, under normal market conditions,<sup>11</sup> will invest at least 80% of its net assets in debt securities whose interest is, in the opinion of bond counsel for the issuer at the time of issuance, exempt from U.S. federal income tax (“Municipal Bonds”).

The Sub-Adviser will invest the Fund’s assets using a barbell strategy, which means that the

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dealers, and the Adviser has implemented and will maintain a fire wall with respect to each broker-dealer affiliate regarding access to information concerning the composition and changes to the portfolio. In the event (a) the Adviser or Sub-Adviser become registered broker-dealers or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

<sup>10</sup> The Commission notes that additional information regarding the Fund, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice, Amendment No. 1 to the proposed rule change, and the Registration Statement, as applicable. See supra notes 3, 4, and 8, respectively.

<sup>11</sup> The term “under normal market conditions” includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

Sub-Adviser will overweight the Fund's investments in Municipal Bonds with maturities on the short and long ends of the fixed income yield curve, while underweighting exposure to Municipal Bonds with intermediate maturities.

Municipal Bonds in which the Fund may invest include one or more of the following: general obligation bonds, which are typically backed by the full faith, credit, and taxing power of the issuer; revenue bonds, which are typically secured by revenues generated by the issuer; discount bonds, which may be originally issued at a discount to par value or sold at market price below par value; premium bonds, which are sold at a premium to par value; zero coupon bonds, which are issued at an original issue discount, with the full value, including accrued interest, paid at maturity; and private activity bonds, which are typically issued by or on behalf of local or state government for the purpose of financing the project of a private user.

The Fund will have no target duration for its investment portfolio, and the Sub-Adviser may target a shorter or longer average portfolio duration based on the Sub-Adviser's forecast of interest rates and view of fixed-income markets generally.<sup>12</sup> The Sub-Adviser will generally apply a heavier weight toward Municipal Bonds with shorter maturities during periods of high interest rates and longer maturities during periods of lower interest rates.<sup>13</sup>

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<sup>12</sup> Duration measures the interest rate sensitivity of a debt security by assessing and weighting the present value of the security's payment pattern. Generally, the longer the maturity, the greater the duration and, therefore, the greater effect interest rate changes have on the price of the security.

<sup>13</sup> According to the Exchange, under normal market conditions, each Municipal Bond held by the Fund must be a constituent of a deal where the deal's original offering amount was at least \$100 million. In addition, no Municipal Bond held by the Fund will exceed 30% of the Fund's net assets, and the five most heavily weighted Municipal Bonds held by the Fund will not in the aggregate account for more than 50% of the Fund's assets. Further, the Fund will hold Municipal Bonds of a minimum of 13 non-affiliated issuers.

With respect to credit quality, under normal market conditions, at least 90% of the Fund's assets invested in Municipal Bonds will be in Municipal Bonds rated "A" or better by at least one major credit rating agency or, if unrated, deemed to be of comparable quality by the Sub-Adviser. From time to time, the Fund may concentrate (i.e., invest more than 25% of its total assets) in particular sectors. The Fund may sell investments for a variety of reasons, such as to adjust the portfolio's average maturity, duration, or overall credit quality, or to shift assets into and out of higher-yielding or lower-yielding securities or certain sectors.

According to the Exchange, under normal market conditions, at least 80% of the Fund's income will be exempt from federal income taxes. However, a significant portion of the Fund's income could be derived from securities subject to the alternative minimum tax.

B. Exchange's Description of the Fund's Other Investments

While the Fund, under normal market conditions, will invest at least 80% of its assets in Municipal Bonds, as described above, the Fund may invest its remaining assets in other assets and financial instruments, as described below.

The Fund may invest in equity securities, both directly and indirectly through investment in shares of ETFs,<sup>14</sup> other investment companies, and other types of securities and instruments described below. The equity portion of the Fund's portfolio may include common stocks traded on securities exchanges or in the OTC market. In addition to common stocks, the equity portion of the Fund's portfolio may also include exchange-traded and OTC preferred stocks, and

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<sup>14</sup> The ETFs in which the Fund may invest will be registered under the 1940 Act and include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). Such ETFs all will be listed and traded in the U.S. on registered exchanges.

exchange-traded and OTC warrants.<sup>15</sup>

The Fund may purchase taxable municipal bonds when the Sub-Adviser believes they offer opportunities for the Fund, or variable rate demand notes (“VRDNs”) that pay interest monthly or quarterly based on a floating rate that is reset daily or weekly based on an index of short-term municipal rates. The Fund also may invest in exchange-traded and OTC securities convertible into common stock. These securities will be convertible bonds and convertible preferred stocks.<sup>16</sup>

The Fund may invest directly and indirectly in cash equivalents, namely, money market instruments that are the following: U.S. Government obligations or corporate debt obligations (including those subject to repurchase agreements), banker’s acceptances<sup>17</sup> and certificates of deposit<sup>18</sup> of domestic branches of banks, commercial paper,<sup>19</sup> and master notes.<sup>20</sup>

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<sup>15</sup> With respect to its exchange-traded equity securities investments, the Fund will normally invest in equity securities that are listed and traded on a U.S. exchange or in markets that are members of the Intermarket Surveillance Group (“ISG”) or parties to a comprehensive surveillance sharing agreement with the Exchange. In any case, not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (except for non-exchange-traded investment company securities) will consist of equity securities whose principal market is not a member of ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

<sup>16</sup> The criteria above also will apply to exchange-traded convertible preferred stocks and exchange-traded stocks into which convertible bonds may be converted. See supra note 15.

<sup>17</sup> Banker’s acceptances are time drafts drawn on and “accepted” by a bank. When a bank “accepts” such a time draft, it assumes liability for its payment. When the Fund acquires a banker’s acceptance, the bank that “accepted” the time draft is liable for payment of interest and principal when due. The banker’s acceptance carries the full faith and credit of such bank.

<sup>18</sup> A certificate of deposit is an unsecured, interest bearing debt obligation of a bank.

<sup>19</sup> Commercial paper is an unsecured, short-term debt obligation of a bank, corporation, or other borrower. Commercial paper maturity generally ranges from two to 270 days and is usually sold on a discounted basis rather than as an interest-bearing instrument. The Fund

In order to maintain sufficient liquidity, to implement investment strategies, or for temporary defensive purposes, the Fund may invest a significant portion of its assets in shares of one or more money market funds. The Fund may also invest in the securities of other non-exchange-traded investment company securities in compliance with the 1940 Act and the rules thereunder.

The Fund may write U.S. exchange-traded call and put options on securities, ETFs, or security indexes to seek income, or may purchase or write U.S. exchange-traded put or call options for hedging purposes.

The Fund may purchase securities on a when-issued basis or for settlement at a future date (forward commitment), if the Fund holds sufficient liquid assets to meet the purchase price.

C. Exchange's Description of the Fund's Investment Restrictions

The Fund may, from time to time, take temporary defensive positions that are inconsistent with its principal investment strategies in an attempt to respond to adverse market, economic, political, or other conditions. In such circumstances, the Fund may hold up to 100% of its portfolio in cash and cash equivalent positions.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), consistent with Commission guidance. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current

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will invest directly in commercial paper only if it is rated in one of the top two rating categories by Moody's, S&P or Fitch or, if not rated, is of equivalent quality in the Adviser's opinion. Commercial paper may include master notes of the same quality. Master notes are unsecured obligations which are redeemable upon demand of the holder and which permit the investment of fluctuating amounts at varying rates of interest.

<sup>20</sup> Master notes may be acquired by the Fund through the master note program of the Fund's custodian bank.

circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2015-93 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>21</sup> to determine whether the proposed rule change, as modified by Amendment No. 1 thereto, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>22</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed

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<sup>21</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>22</sup> Id.



to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”<sup>23</sup>

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>24</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice<sup>25</sup> and in Amendment No.

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<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

<sup>25</sup> See supra note 3.

1 to the proposed rule change,<sup>26</sup> in addition to any other comments they may wish to submit about the proposed rule change.

The Exchange provides that the Fund may invest in one or more of the following broad categories of Municipal Bonds: (a) general obligation bonds; (b) revenue bonds; (c) discount bonds; (d) premium bonds; (e) zero coupon bonds; and (f) private activity bonds. Moreover, the Exchange represents that: (i) each Municipal Bond held by the Fund must be a constituent of a deal where the deal's original offering amount was at least \$100 million; (ii) no Municipal Bond held by the Fund will exceed 30% of the Fund's net assets, and the five most heavily weighted Municipal Bonds held by the Fund will not in the aggregate account for more than 50% of the Fund's assets; and (iii) the Fund will hold Municipal Bonds of a minimum of 13 non-affiliated issuers. Apart from these broad representations, the Exchange provides no other information about the kinds of municipal bonds in which the Fund may invest. Accordingly, the Commission seeks comment on whether the Exchange's representations relating to the Municipal Bonds to be held by the Fund are sufficiently clear in their application to municipal bonds, specifically, and are consistent with the requirements of Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices.

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

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<sup>26</sup> See supra note 4.

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2015-93 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 Numbers SR-NYSEArca-2015-93. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of these filings also will be available for inspection and copying at the principal office of the Exchange. 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-NYSEArca-2015-93 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

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

Robert W. Errett  
Deputy Secretary

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<sup>27</sup> 17 CFR 200.30-3(a)(57).