

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85666; File No. SR-NASDAQ-2019-021)

April 16, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the First Trust California Municipal High Income ETF and the First Trust Municipal High Income ETF

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 2, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) 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 the Exchange. The Commission is publishing this notice 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

The Exchange proposes a rule change relating to the First Trust California Municipal High Income ETF (the “California Fund”) and the First Trust Municipal High Income ETF (the “Municipal Fund”), each a series of First Trust Exchange-Traded Fund III (the “Trust”), the shares of which have been approved by the Commission for listing and trading under Nasdaq Rule 5735 (“Managed Fund Shares”). The California Fund and the Municipal Fund are each, a “Fund” and collectively, the “Funds.” The shares of the Funds are collectively referred to herein as the “Shares.”

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission has approved the listing and trading of Shares under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange.³ The Exchange

³ The Commission approved Nasdaq Rule 5735 in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039). The Commission previously approved the listing and trading of the Shares of each Fund. With respect to the California Fund, see Securities Exchange Act Release No. 80745 (May 23, 2017), 82 FR 24755 (May 30, 2017) (SR-NASDAQ-2017-033) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendments No. 1 and 2 (each, a “California Filing Amendment”), To List and Trade Shares of the First Trust California Municipal High Income ETF) (the “California Prior Release”). With respect to the Municipal Fund, see Securities Exchange Act Release No. 78913 (September 23, 2016), 81 FR 69109 (October 5, 2016) (SR-NASDAQ-2016-002) (Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 3, To List and Trade Shares of the First Trust Municipal High Income ETF of First Trust Exchange-Traded Fund III) (the “Municipal 2016 Release”). Subsequently, the Commission approved a proposed rule change relating to the Municipal Fund, the primary purpose of which was to modify certain representations included in the Municipal 2016 Release. See Securities Exchange Act Release No. 81265 (July 31, 2017), 82 FR 36460 (August 4, 2017) (SR-NASDAQ-2017-038) (Notice of Filing of Amendment No. 1, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 1 and 2 (each, a “Municipal Filing Amendment”), Relating to the First Trust Municipal High Income ETF) (the “Municipal 2017 Release”). The Municipal 2016 Release, together with the Municipal 2017 Release, are referred to collectively as the “Municipal Prior Release.” The California Prior Release and the Municipal Prior Release are each, a “Prior Release” and collectively, the “Prior Releases.”

believes the proposed rule change reflects no significant issues not previously addressed in the Prior Releases.

Each Fund is an actively-managed exchange-traded fund (“ETF”). The Shares of each Fund are offered by the Trust, which was established as a Massachusetts business trust on January 9, 2008. The Trust, which is registered with the Commission as an investment company under the Investment Company Act of 1940 (the “1940 Act”), has, with respect to each Fund, filed a post-effective amendment to its registration statement on Form N-1A (“Registration Statement”) with the Commission.⁴ Each Fund is a series of the Trust.

As described below, the purpose of this proposed rule change is to delete a representation set forth in each Fund’s Prior Release (i.e., the “40/50 Requirement,” as defined below) in order to provide the Adviser with additional flexibility in managing such Fund’s portfolio. The Exchange believes that the proposed modification would provide each Fund with greater ability to select from a broad range of “Municipal Securities” (as defined below) that would support such Fund’s investment goals. Further, the Exchange notes that other recently approved proposed rule changes involving ETFs investing in municipal securities did not include a representation comparable to the 40/50 Requirement.⁵

⁴ See, with respect to each Fund, Post-Effective Amendment No. 98 to Registration Statement on Form N-1A for the Trust, dated November 28, 2018 (File Nos. 333-176976 and 811-22245). The descriptions of the Funds and the Shares contained herein are based, in part, on information in the Registration Statement. First Trust Advisors L.P. (the “Adviser”) represents that the Adviser will not implement the changes described herein until the instant proposed rule change is operative.

⁵ See, e.g., Securities Exchange Act Release Nos. 84381 (October 5, 2018), 83 FR 51752 (October 12, 2018) (SR-NYSEArca-2018-72) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Listing and Trading of Shares of the First Trust Ultra Short Duration Municipal ETF Under NYSE Arca Rule 8.600-E); 84379 (October 5, 2018), 83 FR 51724 (October 12, 2018) (SR-NYSEArca-2018-73) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Listing and Trading of Shares of the First Trust Short Duration Managed Municipal ETF Under

As described in the California Prior Release, the primary investment objective of the California Fund is to seek to provide current income that is exempt from regular federal income taxes and California income taxes, and its secondary objective is long-term capital appreciation. As described in the Municipal 2016 Release, the primary investment objective of the Municipal Fund is to generate current income that is exempt from regular federal income taxes, and its secondary objective is long-term capital appreciation. Under normal market conditions, each Fund seeks to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in municipal debt securities (referred to as “Municipal Securities”) that pay interest that is exempt from regular federal income taxes (and, in the case of the California Fund, California income taxes).

As discussed in the Prior Release for each Fund,⁶ although certain representations included therein met or exceeded similar requirements set forth in the generic listing standards for actively-managed ETFs (“Generic Listing Standards”), it was not anticipated that either Fund would meet the requirement that components that in the aggregate account for at least 75% of the fixed income weight of the portfolio each have a minimum original principal amount outstanding

NYSE Arca Rule 8.600-E); 83982 (August 29, 2018), 83 FR 45168 (September 5, 2018) (SR-NYSEArca-2018-62) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Listing and Trading of Shares of the American Century Diversified Municipal Bond ETF Under NYSE Arca Rule 8.600-E); 82973 (March 30, 2018), 83 FR 14698 (April 5, 2018) (SR-NYSEArca-2017-99) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To List and Trade Shares of the Hartford Schroders Tax-Aware Bond ETF Under NYSE Arca Rule 8.600-E); and 82166 (November 29, 2017), 82 FR 57497 (December 5, 2017) (SR-NYSEArca 2017-90) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Hartford Municipal Opportunities ETF Under NYSE Arca Rule 8.600-E) (collectively, the “Recent Approvals”).

⁶ See, with respect to the California Fund, the California Prior Release and with respect to the Municipal Fund, the Municipal 2017 Release.

of \$100 million or more (the “75/100 Requirement”).⁷ However, the Prior Releases each included a representation that under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, at least 40% (based on dollar amount invested) of the Municipal Securities in which the applicable Fund invests would be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum amount of municipal debt outstanding at the time of purchase of \$50 million or more (the “40/50 Requirement”).⁸

In addition to the 40/50 Requirement, the Prior Releases also included certain other representations. In this regard, the Prior Releases provided that under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows⁹:

- solely with respect to the California Prior Release and the California Fund, such Fund would invest at least 50% of its net assets in “investment grade Municipal Securities” as described in the California Prior Release;
- no component fixed income security (excluding specified U.S. government securities) would represent more than 15% of the applicable Fund’s net assets, and the five most heavily weighted component fixed income securities in such Fund’s portfolio (excluding U.S. government securities) would not, in the aggregate, account for more than 25% of such Fund’s net assets;

⁷ See Nasdaq Rule 5735(b)(1)(B)(i). Similarly, each of the Recent Approvals stated that the applicable ETF would not meet the comparable requirement set forth in Commentary .01(b)(1) to NYSE Arca Rule 8.600-E.

⁸ See, with respect to the California Fund, the California Prior Release and with respect to the Municipal Fund, the Municipal 2017 Release. (The California Prior Release used the defined term “40/50 Requirement” while the Municipal 2017 Release used the defined term “40/50 Representation.”)

⁹ See, with respect to the California Fund, the California Prior Release and with respect to the Municipal Fund, the Municipal 2017 Release.

- the applicable Fund's portfolio of Municipal Securities would include securities from a minimum of 30 non-affiliated issuers; and
- component securities that in the aggregate account for at least 90% of the weight of the applicable Fund's portfolio of Municipal Securities would be exempted securities as defined in Section 3(a)(12) of the Act.

Additionally, the Prior Releases referenced in the preceding paragraph stated that to the extent the applicable Fund invests in Municipal Securities that are mortgage-backed or asset-backed securities, such investments would not account, in the aggregate, for more than 20% of the weight of the fixed income portion of such Fund's portfolio.

In addition to the above, the Prior Releases¹⁰:

- limited the applicable Fund's investments in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, to 15% of such Fund's net assets;
- provided that subject to certain exceptions, the applicable Fund would not invest 25% or more of the value of its total assets in securities of issuers in any one industry; and
- provided that under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, the applicable Fund's investments in Municipal Securities would provide exposure (based on dollar amount invested) to (a) at least 10 different industries (with no more than 25% of the value of such Fund's net assets comprised of Municipal Securities that provide exposure to any single industry) and (b) solely with respect to the

¹⁰ See, with respect to the California Fund, the California Prior Release and with respect to the Municipal Fund, the Municipal 2016 Release and the Municipal 2017 Release.

Municipal Prior Release and the Municipal Fund, at least 15 different states (with no more than 30% of the value of the Municipal Fund's net assets comprised of Municipal Securities that provide exposure to any single state).

(For purposes of this filing, the 40/50 Requirement and the representations described in the three immediately preceding paragraphs are collectively referred to as the "Representations.")

In order to provide each Fund with greater ability to select from a broad range of Municipal Securities that would support such Fund's investment goals, the Exchange is proposing that, going forward, the 40/50 Requirement be deleted.¹¹ As noted above, the Recent Approvals did not include a comparable representation. Further, except for the deletion of the 40/50 Requirement, the Representations would not change. The Exchange believes that notwithstanding the deletion of the 40/50 Requirement, in light of the requirements that would continue to be imposed on each Fund's portfolio, as described herein, the remaining Representations should continue to provide diversity and liquidity and should continue to mitigate the risks associated with manipulation.

In particular, as noted above, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, (a) for each Fund, no component fixed income security (excluding specified U.S. government securities) would represent more than 15% of such Fund's net assets, and the five most heavily weighted component fixed income securities in each Fund's portfolio (excluding U.S. government securities) would not, in the

¹¹ As a related matter, going forward, the 40/50 Requirement would not be included within the meaning of the terms (i) "Portfolio Representations" set forth in California Filing Amendment No. 1 and (ii) "New Representations" set forth in Municipal Filing Amendment No. 1 and the Municipal 2017 Release. Further, going forward, neither Fund is expected to meet the 75/100 Requirement.

aggregate, account for more than 25% of such Fund's net assets; (b) each Fund's portfolio of Municipal Securities would continue to be diversified among a minimum of 30 non-affiliated issuers; (c) component securities that in the aggregate account for at least 90% of the weight of each Fund's portfolio of Municipal Securities would continue to be exempted securities as defined in Section 3(a)(12) of the Act; and (d) each Fund's investments in Municipal Securities would continue to provide exposure (based on dollar amount invested) to at least 10 different industries (with no more than 25% of the value of such Fund's net assets comprised of Municipal Securities that provide exposure to any single industry). In addition, each Fund's investments in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, would continue to be limited to 15% of such Fund's net assets and, subject to certain exceptions, each Fund would not invest 25% or more of the value of its total assets in securities of issuers in any one industry. Further, with respect to the Municipal Fund, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, such Fund's investments in Municipal Securities would continue to provide exposure (based on dollar amount invested) to at least 15 different states (with no more than 30% of the value of such Fund's net assets comprised of Municipal Securities that provide exposure to any single state).

Continued Listing Representations

For each Fund, all statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of the reference asset or intraday indicative values, or (d) the applicability of Exchange listing rules shall constitute continued listing requirements for listing the applicable Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued

listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures with respect to such Fund under the Nasdaq 5800 Series.

The Adviser represents that there would be no change to either Fund's investment objectives. Except as provided herein, with respect to each Fund, all representations made in the applicable Prior Release regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of the reference asset or intraday indicative values, or (d) the applicability of Exchange listing rules (collectively, "Prior Release Continued Listing Representations") would remain unchanged. Except for the generic listing provisions of Nasdaq Rule 5735(b)(1) (the "generic listing standards") and as otherwise provided in this filing, the Funds and the Shares would continue to comply with the requirements applicable to Managed Fund Shares under Nasdaq Rule 5735.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act, in particular, in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The purpose of this proposed rule change is to delete the 40/50 Requirement in order to provide the Adviser with additional flexibility in managing each Fund's portfolio. The Exchange believes that the proposed modification would provide each Fund with greater ability to select from a broad range of Municipal Securities that would support such Fund's investment goals.

Except as provided herein, the Prior Release Continued Listing Representations for each Fund would remain unchanged. Except for the generic listing standards and as otherwise provided in this filing, the Funds and the Shares would continue to comply with the requirements applicable to Managed Fund Shares under Nasdaq Rule 5735.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares would continue to be listed and traded on the Exchange pursuant to Nasdaq Rule 5735. The Exchange also notes the continued listing representations set forth above. The Exchange represents that trading in the Shares would continue to be subject to the existing trading surveillances, administered by both Nasdaq and also the Financial Industry Regulatory Authority (“FINRA”), on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the deletion of the 40/50 Requirement is intended to provide each Fund with greater ability to select from a broad range of Municipal Securities that would support such Fund’s investment goals. Except for the deletion of the 40/50 Requirement, the Representations would not change. The Exchange believes that notwithstanding the deletion of the 40/50 Requirement, in light of the requirements that would continue to be imposed on each Fund’s portfolio, as described herein, the remaining Representations should continue to provide diversity and liquidity and should continue to mitigate the risks associated with manipulation.

In particular, as noted above, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, (a) for each Fund, no component fixed income security (excluding specified U.S. government securities) would represent more

than 15% of such Fund's net assets, and the five most heavily weighted component fixed income securities in each Fund's portfolio (excluding U.S. government securities) would not, in the aggregate, account for more than 25% of such Fund's net assets; (b) each Fund's portfolio of Municipal Securities would continue to be diversified among a minimum of 30 non-affiliated issuers; (c) component securities that in the aggregate account for at least 90% of the weight of each Fund's portfolio of Municipal Securities would continue to be exempted securities as defined in Section 3(a)(12) of the Act; and (d) each Fund's investments in Municipal Securities would continue to provide exposure (based on dollar amount invested) to at least 10 different industries (with no more than 25% of the value of such Fund's net assets comprised of Municipal Securities that provide exposure to any single industry). In addition, each Fund's investments in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, would continue to be limited to 15% of such Fund's net assets and, subject to certain exceptions, each Fund would not invest 25% or more of the value of its total assets in securities of issuers in any one industry. Further, with respect to the Municipal Fund, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, such Fund's investments in Municipal Securities would continue to provide exposure (based on dollar amount invested) to at least 15 different states (with no more than 30% of the value of such Fund's net assets comprised of Municipal Securities that provide exposure to any single state). The Exchange also notes that the Recent Approvals did not include a representation comparable to the 40/50 Requirement.

In addition, a large amount of information would continue to be publicly available regarding the Funds and the Shares, thereby promoting market transparency. For example, the Intraday Indicative Value (as described in the Prior Releases), available on the Nasdaq

Information LLC proprietary index data service, would continue to be widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, each Fund would continue to disclose on its website the Disclosed Portfolio (as defined in Nasdaq Rule 5735(c)(2)) that will form the basis for such Fund's calculation of net asset value ("NAV") at the end of the business day.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that the additional flexibility to be afforded to the Adviser under the proposed rule change is intended to enhance each Fund's ability to meet its investment goals, to the benefit of investors. In addition, consistent with the Prior Releases, NAV per Share would continue to be calculated daily and each Fund's Disclosed Portfolio would continue to be made available to all market participants at the same time. Further, investors would continue to have ready access to information regarding each Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

For the above reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change would provide the Adviser with additional flexibility in managing the Funds, thereby helping each Fund to achieve its investment goals. As such, it is expected that each Fund may become a more attractive investment product in the

marketplace and, therefore, that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹² and subparagraph (f)(6) of Rule 19b-4 thereunder.¹³

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

¹² 15 U.S.C. 78s(b)(3)(A)(iii).

¹³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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. Please include File Number SR-NASDAQ-2019-021 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-NASDAQ-2019-021. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments

are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-021, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Jill M. Peterson
Assistant Secretary

¹⁴ 17 CFR 200.30-3(a)(12).