

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-86278; File No. SR-NASDAQ-2019-052)

July 2, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Regarding the Listing and Trading the Shares of the AlphaMark Actively Managed Small Cap ETF

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 19, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, 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 to change the rule for listing and trading the shares of the AlphaMark Actively Managed Small Cap ETF (the “Fund”) of ETF Series Solutions (the “Trust”). Currently, the shares are listed pursuant to an SEC approval order, but will now be listed pursuant to the generic listing standards under Nasdaq Rule 5735.

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.

---

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

<sup>2</sup> 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 Exchange proposes to change the rule for listing and trading the shares of the Fund. Currently, the shares are listed pursuant to an SEC approval order,<sup>3</sup> but will now be listed pursuant to the generic listing standards under Nasdaq Rule 5735.

The Shares began trading on the Exchange on April 21, 2015 after the Commission issued an order approving the listing and trading of the Shares on the Exchange.<sup>4</sup> At that time, the Exchange was required to file separate proposals under Section 19(b) of the Act before the listing of any funds listed pursuant to Nasdaq Rule 5735 (“Managed Fund Shares”) and, as provided in the Filing, the Exchange will commence delisting procedures under the Nasdaq Rule 5800 series for a Fund where the Fund is not in compliance with the applicable listing requirements.<sup>5</sup> On September 23, 2016, the Commission approved generic listing standards for

---

<sup>3</sup> See Securities Exchange Act Release No.74377 (Feb. 25, 2015), 80 FR 11502 (Mar. 3, 2015) (SR-NASDAQ-2015-013) (order approving the listing and trading on the Exchange of the AlphaMark Actively Managed Small Cap ETF) (the “Filing”).

<sup>4</sup> Id.

<sup>5</sup> As provided in the Filing, all statements and representations made in the Filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference

Managed Fund Shares that would allow shares of a series of Managed Fund Shares to list and trade on the Exchange pursuant to Rule 19b-4(e) so long as the components of that series of Managed Fund Shares meet the criteria in Nasdaq Rule 5735(b)(1) on an initial and continual basis.<sup>6</sup>

The Exchange now proposes to list and trade the Shares pursuant to Rule 19b4(e) of the Act as provided in Nasdaq Rule 5735(b)(1) and, as such, the components of the Fund will be required to comply with the requirements of that rule on an initial and continual basis. The Exchange has confirmed that the Fund's portfolio currently complies with the requirements of Nasdaq Rule 5735(b)(1).<sup>7</sup> The Exchange notes that if the Fund was not already listed, it could be listed pursuant to Rule 19b-4(e) without the submission of a rule filing.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

---

assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

<sup>6</sup> See Securities Exchange Act Release No. 78918 (Sept. 23, 2016), 81 FR 67033 (Sept. 29, 2016) (SR-NASDAQ-2016-104).

<sup>7</sup> As provided in Nasdaq Rule 5735(b)(1), the Fund must also comply with such requirements on a continual basis and any failure to meet such requirements will result in the Exchange initiating delisting proceedings for the Fund pursuant to the Nasdaq Rule 5800 series.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

Specifically, the Exchange believes that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest because the sole change in the proposal is to have the Fund listed and traded on the Exchange pursuant to the generic listing standards under Nasdaq Rule 5735. As noted above, if the Fund was not already listed, it would be able to be listed pursuant to Rule 19b-4(e) without the submission of a rule filing because the SEC has approved rules on the Exchange related to generic listing standards for Managed Fund Shares on the basis that the generic listing criteria is consistent with the Act and, in particular, “is consistent with Section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.”<sup>11</sup>

Therefore, the Exchange believes that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

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 not necessary or appropriate in furtherance of the purposes of the Act. The

---

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> See supra note 8[sic].

Exchange believes that the proposal to allow the Fund to be listed on the Exchange pursuant to the generic listing standards under Nasdaq Rule 5735(b)(1) will have no impact on competition.

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 Act<sup>12</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>13</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>14</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>15</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 so that the proposed rule change may become effective and operative immediately upon filing. The Exchange states that waiver of the 30-day operative delay would streamline and simplify the listing rule applicable to the Shares and thereby reduce

---

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 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.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

the Fund's compliance costs. The Exchange further states that, if the Shares were not currently listed, they would be eligible for immediate listing pursuant to Nasdaq Rule 5735(b)(1) and the Exchange asserts that there is no reason the Shares should be treated differently because they are already listed on the Exchange. For those reasons, the Exchange believes that waiver of the operative delay would be consistent with the protection of investors and the public interest. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>16</sup>

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.

#### 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

---

<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-052 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-2019-052. 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-2019-052 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.<sup>17</sup>

Eduardo A. Aleman  
Deputy Secretary

---

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