

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76245; File No. SR-NASDAQ-2015-124)

October 23, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of the Shares of the Active Alts Contrarian ETF of ETFis Series Trust I

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 October 19, 2015, The NASDAQ Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in in Items I, II, and III below, which Items have been prepared by Nasdaq. 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

Nasdaq proposes to list and trade the shares of the Active Alts Contrarian ETF (the “Fund”) of ETFis Series Trust I (the “Trust”) under Nasdaq Rule 5735 (“Managed Fund Shares”).<sup>3</sup> The shares of the Fund are referred to herein as the “Shares.”

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

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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> 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 Exchange believes the proposed rule change raises no significant issues not previously addressed in prior Commission orders.

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq 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 list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares<sup>4</sup> on the Exchange. The Fund will be an actively-managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust, which was established as a Delaware series trust on September 20, 2012.<sup>5</sup> The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N-1A (“Registration Statement”) with the Commission.<sup>6</sup> The Fund is a series of the

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<sup>4</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940, as amended (15 U.S.C. 80a-1) (the “1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

<sup>5</sup> The Commission has issued an order, upon which the Trust may rely (the “Exemptive Order”), granting certain exemptive relief to the investment adviser to the Fund under the 1940 Act. See Investment Company Act Release No. 30607 (July 23, 2013) (File No. 812-14080).

<sup>6</sup> See Post-Effective Amendment No. 70 to Registration Statement on Form N-1A for the Trust, dated October 16, 2015 (File Nos. 333-187668 and 811-22819). The description

Trust.

Description of the Shares and the Fund

Etfis Capital LLC is the investment adviser (“Adviser”) to the Fund. Active Alts Inc. is the investment sub-adviser to the Fund (the “Sub-Adviser”). The Sub-Adviser is responsible for daily portfolio management and all investment decisions for the Fund. ETF Distributors LLC (the “Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. The Bank of New York Mellon Corporation (“BNY”) will act as the administrator, accounting agent, custodian and transfer agent to the Fund.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.<sup>7</sup> In addition, paragraph (g) further requires that personnel who make

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of the Fund and the Shares contained herein is based, in part, on information in the Registration Statement.

<sup>7</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the “Advisers Act”). As a result, the Adviser, the Sub-Adviser and each such party’s related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with applicable federal securities laws as defined in Rule 204A-1(e)(4). Accordingly, procedures designed to prevent the communication and misuse of nonpublic information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person)

decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, nonpublic information regarding the open-end fund's portfolio. Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not a broker-dealer, although it is affiliated with the Distributor, a broker-dealer. The Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio. The Sub-Adviser is not a broker-dealer and is not affiliated with a broker-dealer. In the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer<sup>8</sup> or registers as a broker-dealer, or (b) any new adviser or new sub-adviser is a registered broker-dealer or is or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund portfolio and will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding such portfolio.

#### Investment Objective

The Fund's investment objective is to seek current income and capital appreciation. The Fund will seek to achieve its investment objective by primarily investing in U.S. exchange-traded equity securities (U.S. exchange-traded equity securities are referred to herein as

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responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>8</sup> In the case of the Adviser, which is already affiliated with a broker-dealer and has implemented a fire wall with respect to such affiliated broker-dealer, this refers to a new affiliation with an additional broker-dealer.

“Equities”<sup>9</sup>) that the Sub-Adviser believes may be subject to a “short squeeze” (as described below). The Fund may also lend portfolio securities that the Sub-Adviser believes may be subject to a short squeeze to short sellers and other market participants for a premium recognized as income. The Fund is an actively managed ETF and thus does not seek to replicate the performance of any index. Instead, the Fund uses an active investment strategy in an effort to meet its investment objective.<sup>10</sup>

### Principal Investments

In selecting securities for the Fund’s portfolio, the Sub-Adviser will seek to identify Equities that it believes have a higher potential for capital appreciation as a result of a short squeeze. A “short squeeze” occurs when investors who have sold short shares of an equity security seek to rapidly cover or buy back the short position due to actual or perceived appreciation in the security, which may occur because of positive news or events related to the company, its market sector or the market generally. Often, the additional buying momentum created by short sellers covering their short positions escalates the increase in the price of the shares. The Fund will not be limited with respect to its investments in any sector or industry, but the Fund will limit investments in a single issuer to no more than five percent (5%) of the total assets of the Fund and to no more than five percent (5%) of the security’s public float. In addition, the Fund will limit its Equities investments to companies with a market capitalization of \$250 million or more.

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<sup>9</sup> As used herein, the term “Equities” includes American Depositary Receipts, but does not include shares of ETFs or closed-end investment companies that are U.S. exchange-traded.

<sup>10</sup> All Equities traded by the Fund will be listed on a U.S. exchange that is a member of the Intermarket Surveillance Group (“ISG”) or a party to a comprehensive surveillance sharing agreement with the Exchange.

The Sub-Adviser's process for identifying short squeeze opportunities involves analysis of both fundamental factors (e.g., quality of earnings, fundamental stability of business, etc.) and technical factors (e.g., price and volume characteristics, relative strength, etc.). Using this analysis, the Sub-Adviser seeks to identify securities where, in the opinion of the Sub-Adviser, short interest is significant, is increasing or is expected to increase, but is unjustified based on the Sub-Adviser's analysis.

To the extent that the Sub-Adviser has not identified Equities suitable for investment, the Fund principally will be invested in cash or money market instruments,<sup>11</sup> and to the extent permitted by applicable law and the Fund's investment restrictions, the Fund may invest in shares of money-market mutual funds. At times the Fund's investment in such investments may be significant.

The Fund may also determine to lend out portfolio securities that the Sub-Adviser believes to be strong candidates for a short squeeze to short sellers and other market participants for a premium recognized as income.

As a result of its trading strategy, the Fund expects to engage in frequent portfolio transactions that will likely result in higher portfolio turnover than many investment companies. Portfolio turnover is a ratio that indicates how often the securities in an investment company's portfolio change during a year. A higher portfolio turnover rate indicates a greater number of changes, and a lower portfolio turnover rate indicates a smaller number of changes. Under normal circumstances, the anticipated annual portfolio turnover rate for the Fund is expected to be greater than 100%.

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<sup>11</sup> The following is a list of the money market instruments in which the Fund may invest: short-term (less than one-year) notes issued by (i) the U.S. government, (ii) an agency of the U.S. government, or (iii) a U.S. corporation.

### Other Investments

The Fund may invest in other types of investments, as set forth in this section. The Fund may invest in any type of ETF that is U.S. exchange-traded, including index based ETFs, sector based ETFs, and fixed-income ETFs — but will not invest in leveraged ETFs. Due to legal limitations, the Fund will be prevented from purchasing more than 3% of an ETF's outstanding shares unless: (i) the ETF or the Fund has received an order for exemptive relief from the 3% limitation from the Commission that is applicable to the Fund; and (ii) the ETF and the Fund take appropriate steps to comply with any conditions in such order. The Fund also may invest in closed-end investment companies that are U.S. exchange-traded.

The Fund may not invest more than 25% of the value of its total assets in securities of issuers in any particular industry.<sup>12</sup> The Fund's investments (including investments in ETFs) will not be utilized to seek to achieve a leveraged return on the Fund's net assets. The Fund will not invest in futures contracts, will not invest in options, will not invest in swaps, and will not invest in other derivative instruments.

### The Shares

The Fund will issue and redeem Shares only in Creation Units, through the Distributor, without a sales load (but subject to transaction fees), at the net asset value ("NAV") next determined after receipt of an order in proper form, on a continuous basis every day except weekends and specified holidays, pursuant to the terms of the agreement executed with each Authorized Participant (as defined below). The NAV of the Fund will be determined once each

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<sup>12</sup> See Form N-1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. See, e.g., Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

business day, normally as of the close of regular trading on the NYSE, generally, 4:00 p.m. Eastern time.<sup>13</sup> Creation Unit sizes will be 25,000 Shares per Creation Unit.

The consideration for purchase of a Creation Unit will consist of either (i) an in-kind deposit of a designated portfolio of securities (the “Deposit Securities”) for each Creation Unit constituting a substantial replication, or a representation, of the securities included in the Fund’s portfolio and an amount of cash (the “Cash Component”) computed as described below or (ii) cash totaling the NAV of the Creation Unit (“Deposit Cash”). The “Cash Component” will be an amount equal to the difference between the NAV of the shares (per Creation Unit) and the market value of the Deposit Securities. The Fund may also effect a portion of an otherwise in-kind creation or redemption for cash, in accordance with the Exemptive Order.

As applicable, (i) the Deposit Securities and the Cash Component, together, or (ii) the Deposit Cash, will constitute the “Fund Deposit,” which will represent the minimum initial and subsequent investment amount for a Creation Unit of the Fund. If the Cash Component is a positive number (i.e., the NAV per Creation Unit exceeds the market value of the Deposit Securities), the Cash Component will be such positive amount. If the Cash Component is a negative number (i.e., the NAV per Creation Unit is less than the market value of the Deposit Securities), the Cash Component will be such negative amount and the creator will be entitled to receive cash from the Fund in an amount equal to the Cash Component. The Cash Component will serve the function of compensating for any difference between the NAV per Creation Unit and the market value of the Deposit Securities.

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<sup>13</sup> NAV per Share will be calculated by dividing the Fund’s net assets by the number of Fund Shares outstanding. For more information regarding the valuation of Fund investments in calculating the Fund’s NAV, see “Net Asset Value” below.



To be eligible to place orders with respect to creations and redemptions of Creation Units, an entity must be (i) a “Participating Party,” i.e., a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the National Securities Clearing Corporation (“NSCC”) or (ii) a Depository Trust Company (“DTC”) Participant (a “DTC Participant”). In addition, each Participating Party or DTC Participant (each, an “Authorized Participant”) must execute an agreement that has been agreed to by the Distributor and the Fund Administrator, BNY, with respect to purchases and redemptions of Creation Units.

BNY, through the NSCC, will make available on each business day, immediately prior to the opening of business on the Exchange’s Regular Market Session (currently 9:30 a.m. Eastern time), the list of the names and the required number of shares of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous business day) for the Fund. Such Fund Deposit, subject to any relevant adjustments, will be applicable in order to effect purchases of Creation Units of the Fund until such time as the next announced composition of the Deposit Securities is made available.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through BNY and only on a business day. With respect to the Fund, BNY, through the NSCC, will make available immediately prior to the opening of business on the Exchange (9:30 a.m. Eastern time) on each business day, the list of the names and share quantities of the Fund’s portfolio securities (“Fund Securities”) that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day. Fund Securities received on redemption may not be identical to Deposit Securities.

Unless cash redemptions are available or specified for the Fund, redemption proceeds for a Creation Unit will consist of Fund Securities as announced by BNY on the business day of the request for redemption received in proper form plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities (the “Cash Redemption Amount”), less a fixed redemption transaction fee and any applicable additional variable charge as set forth in the Registration Statement. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the differential will be required to be made by or through an Authorized Participant by the redeeming shareholder. Notwithstanding the foregoing, at the Trust’s discretion, an Authorized Participant may receive the corresponding cash value of the securities in lieu of one or more Fund Securities.

The creation order and redemption order cut off time for the Fund is expected to be one hour prior to the close of the regular trading session on the Exchange (i.e., typically 3:00 p.m. Eastern time). In the case of custom orders, the Fund may require orders for Creation Units to be placed earlier in the day.

#### Net Asset Value

The NAV per Share for the Fund will be computed by dividing the value of the net assets of the Fund (i.e., the value of its total assets less total liabilities) by the total number of Shares outstanding, rounded to the nearest cent. Expenses and fees, including the management fees, will be accrued daily and taken into account for purposes of determining NAV. The NAV of the Fund will be calculated by BNY and determined at the close of regular trading on the NYSE (ordinarily 4:00 p.m. Eastern time) on each day that such exchange is open. In calculating the Fund’s NAV per Share, investments will generally be valued by using market valuations. A

market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer) or (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer).<sup>14</sup>

Equities and any other exchange traded securities (such as shares of ETFs or closed-end investment companies) will be valued at the official closing price on their principal exchange, or lacking any current reported sale at the time of valuation, at the mean between the most recent bid and asked quotations on the principal exchange. Portfolio securities traded on more than one securities exchange will be valued at the last sale price or official closing price, as applicable, on the business day as of which such value is being determined at the close of the exchange representing the principal market for such securities. Shares of money market mutual funds will be valued at their NAV. Money market instruments will be valued at the mean between the most recent available bid and asked quotations provided by parties that make a market in the instrument. If recent bid and asked quotations are not available, these securities will be valued in accordance with the Fund's fair valuation procedures. Money market instruments with maturities of less than 60 days will be valued at amortized cost.

Notwithstanding the foregoing, in determining the value of any security or asset, the Fund may use a valuation provided by a pricing vendor employed by the Trust and approved by the Trust Board. The pricing vendor may base such valuations upon dealer quotes, by analyzing the listed market, by utilizing matrix pricing, by analyzing market correlations and pricing and/or employing sensitivity analysis.

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<sup>14</sup> Under normal market conditions, the Fund will obtain pricing information on all of its assets from these sources.

The Adviser may use various pricing services, or discontinue the use of any pricing service, as approved by the Trust Board from time to time. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation.

In the event that current market valuations are not readily available or such valuations do not reflect current market value, the Trust's procedures require the Adviser's Pricing Committee to determine a security's fair value in accordance with the Fund's Fair Value Pricing Procedures, which are approved by the Trust Board and consistent with the 1940 Act.<sup>15</sup> In determining such value the Adviser's Pricing Committee may consider, among other things, (i) price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators. In these cases, the Fund's NAV may reflect certain portfolio securities' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security is materially different than the value that could be realized upon the sale of the security.

#### Availability of Information

The Fund's website, ActiveAlts.com, which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The website will include additional quantitative information updated on a daily basis, including, for the Fund: (1) the prior business day's reported NAV, mid-point of the bid/ask spread at the

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<sup>15</sup> The Valuation Committee of the Trust Board will be responsible for the oversight of the pricing procedures of the Fund and the valuation of the Fund's portfolio. The Valuation Committee has delegated day-to-day pricing responsibilities to the Adviser's Pricing Committee, which will be composed of officers of the Adviser. The Pricing Committee will be responsible for the valuation and revaluation of any portfolio investments for which market quotations or prices are not readily available. The Trust and the Adviser have implemented procedures designed to prevent the use and dissemination of material, nonpublic information regarding valuation and revaluation of any portfolio investments.

time of calculation of such NAV (the “Bid/Ask Price”),<sup>16</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV; (2) 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; and (3) daily trading volume. On each business day, before commencement of trading in Shares in the Regular Market Session<sup>17</sup> on the Exchange, the Trust will disclose on its website the identities and quantities of the portfolio of securities and other assets (the “Disclosed Portfolio”) held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the business day.<sup>18</sup>

On a daily basis, the Fund will disclose for each portfolio security and other asset of the Fund the following information on the Fund’s website (if applicable): name, ticker symbol, CUSIP number or other identifier, if any; type of holding (such as “common stock”, “note”, “mutual fund”); quantity held (as measured by, for example, number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holdings in the Fund’s portfolio. The website

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<sup>16</sup> The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund’s NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

<sup>17</sup> See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 7 a.m. to 9:30 a.m. Eastern time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. Eastern time; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m. Eastern time).

<sup>18</sup> Under accounting procedures to be followed by the Fund, trades made on the prior business day (“T”) will be booked and reflected in NAV on the current business day (“T+1”). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in Rule 5735 as the “Intraday Indicative Value,” that reflects an estimated intraday value of the Fund’s portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,<sup>19</sup> will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated and broadly displayed at least every 15 seconds during the Regular Market Session. In addition, during hours when the local markets for foreign securities in the Fund’s portfolio are closed, the Intraday Indicative Value will be updated at least every 15 seconds during the Regular Market Session to reflect currency exchange fluctuations.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Investors will also be able to obtain the Fund’s Statement of Additional Information (“SAI”), the Fund’s Shareholder Reports, and its Form N-CSR and Form N-SAR, filed twice a year. The Fund’s SAI and Shareholder Reports will be available from the Fund free upon request, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission’s website at [www.sec.gov](http://www.sec.gov).

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<sup>19</sup> Currently, the NASDAQ OMX Global Index Data Service (“GIDS”) is the NASDAQ OMX global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

Intra-day, executable price quotations of the Equities, any other exchange-traded securities, and money market instruments and money-market mutual funds, held by the Fund are available from major broker-dealer firms or on the exchanges on which they are traded, if applicable. The foregoing intra-day price information is available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors. The previous day's closing price and trading volume information for the Equities and any other exchange-traded securities held by the Fund will be published daily in the financial section of newspapers. Quotation and last sale information for the Equities and any other exchange-traded securities held by the Fund will be available via UTP Level 1, as well as Nasdaq proprietary quote and trade services.

Information regarding market price and volume of the Shares is and 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 trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via UTP Level 1, as well as Nasdaq proprietary quote and trade services.

#### Initial and Continued Listing

The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Fund must be in compliance with Rule 10A-3<sup>20</sup> under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will

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<sup>20</sup> See 17 CFR 240.10A-3.

be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

#### Trading Halts and Trading Pauses

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt or pause trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities and/or the financial instruments constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

#### Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in the Shares from 7:00 a.m. until 8:00 p.m. Eastern time. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is \$0.01.

#### Surveillance

The Exchange represents that trading in the Shares will 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.<sup>21</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. In addition, the Exchange may obtain information from the Trade Reporting and Compliance Engine (“TRACE”), which is the FINRA-developed vehicle that facilitates mandatory reporting of over-the-counter secondary market transactions in eligible fixed income securities.<sup>22</sup>

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, Equities, or other exchange-traded securities with other markets and other entities that are Intermarket Surveillance Group (“ISG”) members, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, Equities, or other exchange-traded securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, Equities, or other exchange-traded securities from markets and other entities that are members of ISG or with which the Exchange has in place a

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<sup>21</sup> FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

<sup>22</sup> All broker/dealers who are FINRA member firms have an obligation to report transactions in corporate bonds to TRACE.

comprehensive surveillance sharing agreement.<sup>23</sup> FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain money market instruments held by the Fund reported to FINRA's TRACE.

All Equities, and any shares of ETFs or closed-end investment companies, held by the Fund will be listed on a U.S. exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange. In addition, the Exchange also has a general policy prohibiting the distribution of material, nonpublic information by its employees.

#### Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how and by whom information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. Members purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The

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<sup>23</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org).

Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV Calculation Time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's website.

## 2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act<sup>24</sup> in general and Section 6(b)(5) of the Act<sup>25</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 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 a national market system.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5735. The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on Nasdaq during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Adviser is affiliated with a broker-dealer and has implemented a "fire wall" with respect to such broker-dealer regarding access to information

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<sup>24</sup> 15 U.S.C. 78f.

<sup>25</sup> 15 U.S.C. 78f(b)(5).

concerning the composition and/or changes to the Fund's portfolio. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

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 Exchange will obtain a representation from the issuer of the Shares that the NAV per share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. All Equities, and any shares of ETFs or exchange-traded investment companies, traded by the Fund will be listed on a U.S. exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange. The Fund's portfolio holdings will be disclosed on its website daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service will be widely disseminated 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, the Fund will disclose on its website the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information for the Shares will

be available via UTP Level 1, as well as Nasdaq proprietary quote and trade services. Intra-day, executable price quotations on the Equities, money market instruments, shares of ETFs, shares of exchange-traded investment companies, and other assets held by the Fund are available from major broker-dealer firms or on the exchanges on which they are traded, if applicable. The foregoing Intra-day price information is available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors.

The website for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Trading in Shares of the Fund will be halted if the circuit breaker parameters in Nasdaq Rule 4120(a)(11) have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In

addition, as noted above, investors will have ready access to information regarding the 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 will facilitate the listing and trading of an additional type of actively-managed exchange-traded fund that will enhance competition among market participants, to the benefit of investors and the marketplace.

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

Written comments were neither solicited nor received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2015-124 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-2015-124. 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 such filing will also 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-NASDAQ-2015-124 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>26</sup>

Robert W. Errett  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).