

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76538; File No. SR-NASDAQ-2015-124)

December 2, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change to List and Trade Shares of the Active Alts Contrarian ETF of ETFis Series Trust I

I. Introduction

On October 19, 2015, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Active Alts Contrarian ETF (“Fund”) of ETFis Series Trust I (“Trust”) under Nasdaq Rule 5735. The proposed rule change was published for comment in the Federal Register on October 29, 2015.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. The Exchange’s Description of the Proposal⁴

Nasdaq proposes to list and trade the Shares under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares.⁵ The Fund will be an actively-managed exchange-

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 76245 (Oct. 23, 2015), 80 FR 66594 (“Notice”).

⁴ Additional information regarding, among other things, the Shares, the Fund, its investment objective, its investments, its investment strategies, its investment methodology, its fees, its creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures can be found in the Notice and in the Registration Statement. See Notice, supra note 3, and Registration Statement, infra note 6, respectively.

⁵ 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

traded fund (“ETF”). The Shares will be offered by the Trust, which was established as a Delaware series trust on September 20, 2012.⁶ The Fund will be a series of the Trust. Etfis Capital LLC will be the investment adviser (“Adviser”) to the Fund. Active Alts Inc. will be the investment sub-adviser to the Fund (“Sub-Adviser”).⁷ ETF Distributors LLC (“Distributor”) will be the principal underwriter and distributor of the Shares. The Bank of New York Mellon Corporation (“BNY”) will act as the administrator, accounting agent, custodian and transfer agent to the Fund.

investment objectives and policies.

⁶ 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. See Post-Effective Amendment No. 70 to Registration Statement on Form N-1A for the Trust, dated Oct. 16, 2015 (File Nos. 333-187668 and 811-22819). The description of the Fund and the Shares contained herein is based, in part, on information in the Registration Statement. The Commission has issued an order, upon which the Trust may rely (“Exemptive Order”), granting certain exemptive relief to the investment adviser to the Fund under the 1940 Act. See Investment Company Act Release No. 30607 (Jul. 23, 2013) (File No. 812-14080).

⁷ An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“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) responsible for administering the policies and procedures adopted under subparagraph (i) above.

The Exchange represents that 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 Exchange represents that the Sub-Adviser is not a broker-dealer and is not affiliated with a broker-dealer.⁸

A. Principal Investments of the Fund

The Exchange states that 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 (referred to herein as "Equities"⁹) that the Sub-Adviser believes have a higher potential for capital appreciation as a result of a "short squeeze."¹⁰ 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-

⁸ See Notice, supra note 3, 80 FR at 66595. In the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer 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.

⁹ 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.

¹⁰ The Exchange describes a "short squeeze" as occurring 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. The Exchange states that often, the additional buying momentum created by short sellers covering their short positions escalates the increase in the price of the shares.

Adviser, short interest is significant, is increasing or is expected to increase, but is unjustified based on the Sub-Adviser's analysis.

The Exchange states that, to the extent the Sub-Adviser has not identified Equities suitable for investment, the Fund principally will be invested in cash or money market instruments,¹¹ 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.

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.

B. Other Investments

The Exchange states that 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. The Fund also may invest in closed-end investment companies that are U.S. exchange-traded.

C. Investment Restrictions

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 of the total assets of the Fund and to no more than five percent 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.

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%

¹¹ 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.

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'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 Fund also will not invest in leveraged ETFs.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹³ which requires, among other things, that the Exchange's rules be designed 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.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,¹⁴ which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotation

¹² In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78k-1(a)(1)(C)(iii).

and last sale information for the Shares and 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. 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. 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. 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.

The Commission also believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. On each business day, before commencement of trading in Shares in the Regular Market Session¹⁵ 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.¹⁶

¹⁵ 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).

¹⁶ Under accounting procedures to be followed by the Fund, trades made on the prior

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. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,¹⁷ 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.

BNY, through the National Securities Clearing Corporation, 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. The NAV of the Fund will be calculated by BNY and determined at the close of regular trading on the New York Stock Exchange (ordinarily 4:00 p.m. Eastern time) on each day that such exchange is open. The website for the

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.

¹⁷ 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.

Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Exchange represents that trading in Shares 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. The Exchange states that it has a general policy prohibiting the distribution of material, nonpublic information by its employees.¹⁸ The Exchange represents that the Adviser is affiliated with a broker-dealer and has implemented a “fire wall” with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund’s portfolio. The Exchange has represented that the Sub-Adviser is not a broker-dealer and is not affiliated with a broker-dealer.¹⁹

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. The Exchange states 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.²⁰ On behalf of the Exchange, FINRA 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

¹⁸ See Notice, supra note 3, 80 FR at 66598.

¹⁹ See note 8, supra, and accompanying text.

²⁰ 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.

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 comprehensive surveillance sharing agreement.²¹ 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 Trade Reporting and Compliance Engine.

The Exchange represents that it 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.²² In support of this proposal, the Exchange has also made the following representations:

- (1) The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.²³
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.²⁴
- (3) Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also the FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of

²¹ For a list of the current members of ISG, see www.isgportal.org.

²² See Notice, *supra* note 3, 80 FR at 66598.

²³ See *id.* at 66594.

²⁴ See *id.* at 66598.

Exchange rules and applicable federal securities laws.²⁵

- (4) 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: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how and by whom information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (d) 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; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.²⁶
- (5) For initial and/or continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.²⁷
- (6) The Fund will limit its Equities investments to companies with a market capitalization of \$250 million or more.²⁸

²⁵ See id.

²⁶ See id. at 66598–66599.

²⁷ See 17 CFR 240.10A-3. See also Notice, supra note 3, 80 FR at 66598.

²⁸ See id. at 66595.

- (7) 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.²⁹
- (8) The Fund will not invest in leveraged ETFs.³⁰
- (9) 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.³¹
- (10) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.³²

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act³³ and the rules and regulations thereunder applicable to a national securities exchange.

²⁹ See id. at 66598.

³⁰ See id. at 66595.

³¹ See id. at 66596.

³² See id. at 66598.

³³ 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR-NASDAQ-2015-124) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

Robert W. Errett
Deputy Secretary

³⁴ 17 CFR 200.30-3(a)(12).