

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77548; File No. SR-NASDAQ-2015-161)

April 6, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3 Thereto, Relating to the Listing and Trading of the Shares of the First Trust RiverFront Dynamic Europe ETF, First Trust RiverFront Dynamic Asia Pacific ETF, First Trust RiverFront Dynamic Emerging Markets ETF, and First Trust RiverFront Dynamic Developed International ETF of First Trust Exchange-Traded Fund III

I. Introduction

On December 22, 2015, The NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or Exchange Act)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade the shares of the First Trust RiverFront Dynamic Europe ETF (“Europe Fund”); First Trust RiverFront Dynamic Asia Pacific ETF (“Asia Pacific Fund”); First Trust RiverFront Dynamic Emerging Markets ETF (“Emerging Markets Fund”); and First Trust RiverFront Dynamic Developed International ETF (“Developed International Fund”). The proposed rule change was published for comment in the Federal Register on January 8, 2016.³ On January 8, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ On February 18, 2016, the Exchange filed Amendment No. 2 to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 76817 (January 4, 2016), 81 FR 978 (“Notice”).

⁴ In Amendment No. 1, the Exchange clarified the proposed rule change by providing additional information regarding the currencies, and instruments that provide exposure to such currencies, in which each Fund will invest. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise novel regulatory issues, Amendment No. 1 is not subject to notice and comment

proposed rule change.⁵ On February 19, 2016, pursuant to Section 19(b)(2) of the Act,⁶ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁷ On April 5, 2016, the Exchange filed Amendment No. 3 to the proposed rule change.⁸ The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto.

II. Exchange's Description of the Proposal

The Exchange proposes to list and trade the shares ("Shares") of the Europe Fund, Asia Pacific Fund, Emerging Markets Fund, and Developed International Fund (individually, "Fund,"

(Amendment No. 1 is available at: <http://www.sec.gov/comments/sr-nasdaq-2015-161/nasdaq2015161-1.pdf>).

⁵ In Amendment No. 2, the Exchange expanded the application of the Alternative Criteria (as discussed below) so that they will apply on a continual basis. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise novel regulatory issues, Amendment No. 2 is not subject to notice and comment (Amendment No. 2 is available at: <http://www.sec.gov/comments/sr-nasdaq-2015-161/nasdaq2015161-2.pdf>).

⁶ 15 U.S.C. 78s(b)(2).

⁷ See Securities Exchange Act Release No. 77192, 81 FR 9575 (February 25, 2016).

⁸ In Amendment No. 3 to the proposed rule change, the Exchange clarified that: (a) all statements and representations made in the proposal regarding the description of the portfolios, limitations on portfolio holdings or reference assets, or the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange; (b) the issuer will advise the Exchange of any failure by the Funds to comply with the continued listing requirements; (c) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements; and (d) if a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. Because Amendment No. 3 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment (Amendment No. 3 is available at: <http://www.sec.gov/comments/sr-nasdaq-2015-161/nasdaq2015161-3.pdf>).

and collectively, “Funds”) under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. Each Fund, which will be a series of First Trust Exchange-Traded Fund III (“Trust”), will be an actively managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust,⁹ which was established as a Massachusetts business trust on January 9, 2008. The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N-1A with the Commission.¹⁰

First Trust Advisors L.P. will be the investment adviser (“Adviser”) to the Funds. RiverFront Investment Group, LLC will serve as investment sub-adviser (“Sub-Adviser”) to the Funds and provide day-to-day portfolio management. First Trust Portfolios L.P. (“Distributor”) will be the principal underwriter and distributor of each Fund’s Shares. Brown Brothers Harriman & Co. will act as the administrator, accounting agent, custodian, and transfer agent to the Funds. According to the Exchange, neither the Adviser nor the Sub-Adviser is a broker-dealer, although the Adviser is affiliated with the Distributor, a broker-dealer, and the Sub-Adviser is affiliated with Robert W. Baird & Co. Incorporated, a broker-dealer. Each of the Adviser and Sub-Adviser has implemented a fire wall with respect to its respective broker-dealer affiliate regarding access to information concerning the composition or changes to a portfolio.¹¹

⁹ According to the Exchange, the Trust has obtained certain exemptive relief under the Investment Company Act of 1940 (“1940 Act”). See Investment Company Act Release No. 28468 (October 27, 2008) (File No. 812-13477).

¹⁰ See Post-Effective Amendment No. 29 to Registration Statement on Form N-1A for the Trust, dated November 19, 2015 (File Nos. 333-176976 and 811-22245) (“Registration Statement”).

¹¹ In the event (a) the Adviser or the Sub-Adviser registers as a broker-dealer, or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with another 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 of, and/or changes to, a portfolio and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

The Exchange has made the following representations and statements describing the Funds and the Funds' investment strategies, including the Funds' portfolio holdings and investment restrictions.¹²

A. Exchange's Description of Principal Investment Strategies Applicable to Each Fund

Each Fund's investment objective will be to provide capital appreciation. Under normal market conditions,¹³ each Fund will seek to achieve its investment objective by investing at least 80% of its net assets (including investment borrowings) in a combination of: (i) "Principal Fund Equity Securities" (as defined below); (ii) forward currency contracts and non-deliverable forward currency contracts (collectively, "Forward Contracts"); and (iii) currency transactions on a spot (i.e., cash) basis.¹⁴

¹² Additional information regarding the Funds, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value ("NAV"), distributions, and taxes, among other things, can be found in the Notice, the amendments, and the Registration Statement, as applicable. See Notice, Amendment Nos. 1-3, and Registration Statement, supra notes 3, 4, 5, 8, and 10, respectively.

¹³ The term "under normal market conditions" as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the securities markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance. On a temporary basis, including for defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, a Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, a Fund may not be able to achieve its investment objective. A Fund may adopt a defensive strategy when the Adviser and/or the Sub-Adviser believes securities in which such Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

¹⁴ A Fund would enter into Forward Contracts and/or currency spot transactions for hedging purposes.

For each Fund, (a) “Principal Equity Securities” will consist of the following U.S. and non-U.S. exchange-listed securities: (i) common stocks; (ii) common and preferred shares of real estate investment trusts (“REITs”); and (iii) American Depositary Receipts (“ADRs”), European Depositary Receipts (“EDRs”), and Global Depositary Receipts (“GDRs” and, together with ADRs and EDRs, collectively, “Depositary Receipts”),¹⁵ and (b) “Principal Fund Equity Securities” will consist of Principal Equity Securities that are suggested by such Fund’s name.¹⁶ Accordingly:

(1) for the Europe Fund, Principal Fund Equity Securities will be Principal Equity Securities of European companies;¹⁷

(2) for the Asia Pacific Fund, Principal Fund Equity Securities will be Principal Equity Securities of Asian Pacific companies;¹⁸

(3) for the Emerging Markets Fund, Principal Fund Equity Securities will be Principal Equity Securities of emerging market companies;¹⁹ and

¹⁵ The Funds will not invest in any unsponsored Depositary Receipts.

¹⁶ With respect to Depositary Receipts, whether such Principal Equity Securities are Principal Fund Equity Securities is based on the underlying securities, the ownership of which is represented by the Depositary Receipts (i.e., whether, as described below, the relevant underlying security is a security of a European company, an Asian Pacific company, an emerging market company, or a developed market company, as applicable).

¹⁷ European companies are those companies (i) whose securities are traded principally on a stock exchange in a European country, (ii) that are organized under the laws of or have a principal office in a European country, or (iii) that have at least 50% of their assets in, or derive at least 50% of their revenues or profits from, a European country.

¹⁸ Asian Pacific companies are those companies (i) whose securities are traded principally on a stock exchange in an Asian Pacific country, (ii) that are organized under the laws of or have a principal office in an Asian Pacific country, or (iii) that have at least 50% of their assets in, or derive at least 50% of their revenues or profits from, an Asian Pacific country.

¹⁹ An emerging market company is one (i) domiciled or with a principal place of business or primary securities trading market in an emerging market country, or (ii) that derives a substantial portion of its total revenues or profits from emerging market countries.

(4) for the Developed International Fund, Principal Fund Equity Securities will be Principal Equity Securities of developed market companies.²⁰

In selecting securities for a Fund, the Sub-Adviser will score individual securities from a portfolio of eligible securities according to several core attributes, using multiple proprietary factors within each core attribute. The Sub-Adviser will then rank each qualifying security based on its core attribute score, and the highest scoring securities will be considered for inclusion in the Fund's portfolio. The Sub-Adviser will utilize its proprietary optimization process to maximize the percentage of high-scoring securities included in each Fund's portfolio.

In addition, for each Fund, by entering into Forward Contracts and currency spot transactions, the Sub-Adviser will deploy a dynamic currency hedge (hedging up to 100% of such Fund's foreign currency exposure) based on its proprietary hedging methodology. The Sub-Adviser's hedging methodology will be constructed from a combination of quantitative measures and qualitative measures. Each Fund will only enter into transactions in Forward Contracts with counterparties that the Adviser and/or the Sub-Adviser reasonably believe are capable of performing under the applicable Forward Contract.²¹

²⁰ Developed market companies are those companies (i) whose securities are traded principally on a stock exchange in a developed market country, (ii) that are organized under the laws of or have a principal office in a developed market country, or (iii) that have at least 50% of their assets in, or derive at least 50% of their revenues or profits from, a developed market country.

²¹ According to the Exchange, each Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser and/or the Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser's and/or Sub-Adviser's analysis will evaluate each approved counterparty using various methods of analysis and may consider the Adviser's and/or Sub-Adviser's past experience with the counterparty, its known disciplinary history, and its share of market participation.

B. Exchange's Description of Other Investments for the Funds

According to the Exchange, each Fund may invest (in the aggregate) up to 20% of its net assets in the following securities and instruments.

Each Fund may invest in the following U.S. and non-U.S. exchange-listed securities (other than Principal Fund Equity Securities): (i) common stocks; (ii) common and preferred shares of REITs; (iii) Depository Receipts; and (iv) equity securities of business development companies (collectively, "Other Equity Securities").²²

Each Fund may invest in short-term debt securities and other short-term debt instruments (described below), as well as cash equivalents, or it may hold cash. The percentage of each Fund invested in such holdings or held in cash will vary and will depend on several factors, including market conditions. Each Fund may invest in the following short-term debt instruments:²³ (1) fixed rate and floating rate U.S. government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. government agencies or instrumentalities; (2) certificates of deposit issued against funds deposited in a bank or savings and loan association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements,²⁴ which involve purchases of debt securities; (5) bank time deposits, which are

²² For each Fund, Other Equity Securities and Principal Fund Equity Securities are referred to collectively as "Equity Securities."

²³ The Exchange represents that short-term debt instruments will be issued by issuers having a long-term debt rating of at least A by Standard & Poor's Ratings Services ("S&P Ratings"), Moody's Investors Service, Inc. ("Moody's"), or Fitch Ratings ("Fitch"), and have a maturity of one year or less.

²⁴ According to the Exchange, each Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser and/or the Sub-Adviser to present minimal credit risks in accordance with criteria approved by the Board of Trustees of the Trust. The Adviser and/or the Sub-Adviser will review and monitor the creditworthiness of such institutions. The Adviser and/or the Sub-Adviser will monitor

monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (6) commercial paper, which is short-term unsecured promissory notes;²⁵ and (7) short-term debt obligations issued or guaranteed by non-U.S. governments or by their agencies or instrumentalities.

Each Fund may invest (but only up to 5% of its net assets) in exchange-listed equity index futures contracts.

C. Exchange's Description of the Funds' Equity Securities

According to the Exchange, under normal market conditions, each Fund will invest in at least 20 Equity Securities. Each Fund will satisfy the "ISG Criteria" (as described below) and/or the "Alternative Criteria" (as described below).

A Fund will satisfy the ISG Criteria if at least 90% of such Fund's net assets that are invested (in the aggregate) in Equity Securities will be invested in Equity Securities that trade in markets that are members of the Intermarket Surveillance Group ("ISG")²⁶ or are parties to a comprehensive surveillance sharing agreement with the Exchange.

A Fund will satisfy the Alternative Criteria if, under normal market conditions, its Equity Securities meet the following criteria at the time of purchase and on a continuous basis: (1) non-U.S. Equity Securities²⁷ each shall have a minimum market value of at least \$100 million; (2)

the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement. The Funds will not enter into reverse repurchase agreements.

²⁵ Each Fund may only invest in commercial paper rated A-1 or higher by S&P Ratings, Prime-1 or higher by Moody's, or F1 or higher by Fitch.

²⁶ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio for a Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

²⁷ For purposes of this filing, the term "non-U.S. Equity Securities" means Equity Securities

non-U.S. Equity Securities each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of \$25,000,000, averaged over the last six months; (3) the most heavily weighted non-U.S. Equity Security shall not exceed 25% of the weight of the Fund's entire portfolio and, to the extent applicable, the five most heavily weighted non-U.S. Equity Securities shall not exceed 60% of the weight of the Fund's entire portfolio; (4) each non-U.S. Equity Security shall be listed and traded on an exchange that has last-sale reporting; and (5) all of such Fund's net assets that are invested (in the aggregate) in Equity Securities other than non-U.S. Equity Securities shall be invested in Equity Securities that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

D. Exchange's Description of the Funds' Transactions in Forward Contracts and Exchange-Listed Equity Index Futures Contracts

According to the Exchange, each Fund's transactions in Forward Contracts and exchange-listed equity index futures contracts will be consistent with its investment objective and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index. Each Fund will comply with the regulatory requirements of the Commission with respect to coverage in connection with its transactions in Forward Contracts and exchange-listed equity index futures contracts. If the applicable guidelines prescribed under the 1940 Act so require, a Fund will earmark cash, U.S. government securities and/or other liquid assets permitted by the Commission in the amount prescribed.

that are not listed on a U.S. exchange.

E. Exchange's Description of the Funds' Investment Restrictions

Each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), deemed illiquid by the Adviser and/or the Sub-Adviser.²⁸ Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of such Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Funds may not invest 25% or more of the value of their respective total assets in securities of issuers in any one industry. This restriction does not apply to (a) obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or (b) securities of other investment companies.

Each Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities

²⁸ According to the Exchange, in determining the liquidity of the Funds' investments, the Adviser and/or the Sub-Adviser may consider the following factors: (i) the frequency of trades and quotes for the security or other instrument; (ii) the number of dealers wishing to purchase or sell the security or other instrument and the number of other potential purchasers; (iii) dealer undertakings to make a market in the security or other instrument; and (iv) the nature of the security or other instrument and the nature of the marketplace in which it trades (e.g., the time needed to dispose of the security or other instrument, the method of soliciting offers and the mechanics of transfer).

exchange.²⁹ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, is consistent with Section 6(b)(5) of the Exchange Act,³⁰ 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 also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,³¹ which sets forth Congress’s 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 and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association (“CTA”) plans for the Shares. On each business day, before commencement of trading in Shares in the Regular Market Session³² on the Exchange, each Fund will disclose on its website the Disclosed Portfolio held by such Fund that will form the basis for such Fund’s calculation of NAV at the end of the business day.³³ The

²⁹ 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).

³⁰ 15 U.S.C. 78f(b)(5).

³¹ 15 U.S.C. 78k-1(a)(1)(C)(iii).

³² See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m., Eastern Time).

³³ Nasdaq Rule 5735(c)(2) defines the term “Disclosed Portfolio.” According to the Exchange, each Fund’s disclosure of derivative positions in the Disclosed Portfolio will

NAV of each Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m., Eastern Time.³⁴

include sufficient information for market participants to use to value these positions intraday. On a daily basis, each Fund will also disclose on its website the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, index, or other asset or instrument underlying the holding, if any; quantity held (as measured by, for example, par value, notional value, or number of shares, contracts, or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the Fund's portfolio. The website information will be publicly available at no charge.

³⁴ According to the Exchange, the Funds' investments will be valued daily. The following investments will typically be valued using information provided by a third-party pricing service ("Pricing Service"): (a) except as provided below, short term U.S. government securities, commercial paper, bankers' acceptances, and short-term debt obligations issued or guaranteed by non-U.S. governments or by their agencies or instrumentalities (collectively, "Short Term Debt Instruments"); and (b) currency spot transactions. Debt instruments may be valued at evaluated mean prices, as provided by Pricing Services. Short Term Debt Instruments having a remaining maturity of 60 days or less when purchased will typically be valued at cost adjusted for amortization of premiums and accretion of discounts, provided the pricing committee of the Adviser ("Pricing Committee") has determined that the use of amortized cost is an appropriate reflection of value given market and issuer specific conditions existing at the time of the determination. Overnight repurchase agreements will be valued at amortized cost when it represents the best estimate of value. Term repurchase agreements (*i.e.*, those whose maturity exceeds seven days) will be valued at the average of the bid quotations obtained daily from at least two recognized dealers. Certificates of deposit and bank time deposits will typically be valued at cost. Equity Securities that are listed on any exchange other than the Exchange and the London Stock Exchange Alternative Investment Market ("AIM") will typically be valued at the last-sale price on the exchange on which they are principally traded on the business day as of which such value is being determined. Equity Securities listed on the Exchange or the AIM will typically be valued at the official closing price on the business day as of which such value is being determined. If there has been no sale on such day, or no official closing price in the case of securities traded on the Exchange or the AIM, such securities will typically be valued using fair value pricing. Equity 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. Exchange-listed equity index futures contracts will typically be valued at the closing price in the market where such instruments are

In addition, the Intraday Indicative Value³⁵ for each Fund, available on the NASDAQ OMX Information LLC proprietary index data service, will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. The Intraday Indicative Value will be based on quotes and closing prices from the securities' local market and may not reflect events that occur subsequent to the local market's close.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding 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 Equity Securities (to the extent traded on a U.S. exchange) will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Pricing information for Short-Term Debt Instruments, repurchase agreements, Forward Contracts, bank time deposits, certificates of deposit, and currency spot transactions will be available from major broker-dealer firms and/or major market data vendors and/or Pricing Services. Pricing information for exchange-listed equity index futures contracts and non-U.S. Equity Securities will be available from the

principally traded. Forward Contracts will typically be valued at the current day's interpolated foreign exchange rate, as calculated using the current day's spot rate, and the thirty, sixty, ninety, and one-hundred-eighty day forward rates provided by a Pricing Service or by certain independent dealers in such contracts. Assets denominated in foreign currencies will be translated into U.S. dollars at the exchange rate of such currencies against the U.S. dollar as provided by a Pricing Service. The value of assets denominated in foreign currencies will be converted into U.S. dollars at the exchange rates in effect at the time of valuation.

³⁵ Nasdaq Rule 5735(c)(3) defines the term "Intraday Indicative Value."

applicable listing exchange and from major market data vendors. In addition, the Exchange notes that the Funds' website will include a form of the prospectus for the Funds and additional data relating to NAV and other applicable quantitative information.

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. The Exchange states that it 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. The Exchange also represents that it may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. The Exchange will halt 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.³⁶ Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange further states that neither the Adviser nor the Sub-Adviser is a broker-dealer, but each is affiliated with a broker-dealer, and that the Adviser and Sub-Adviser has each implemented a fire wall with respect to its respective broker-dealer affiliate regarding access to information concerning the composition of, and

³⁶ These may include: (1) the extent to which trading is not occurring in the securities and/or the other assets constituting the Disclosed Portfolio of a Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

changes to, each Fund’s portfolio.³⁷ Further, the Commission notes that the Reporting Authority³⁸ that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.³⁹ 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.⁴⁰

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. In support of this proposal, the Exchange represented that:

³⁷ See supra note 11 and accompanying text. The Exchange further represents that 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 their 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 other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public 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.

³⁸ Nasdaq Rule 5735(c)(4) defines “Reporting Authority.”

³⁹ See Nasdaq Rule 5735(d)(2)(B)(ii).

⁴⁰ The Exchange represents that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA’s performance under this regulatory services agreement.

- (1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. 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.
- (3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and certain of the Equity Securities and exchange-listed equity index futures contracts held by the Funds with other markets and other entities that are members of ISG, and FINRA may obtain trading information regarding trading in the Shares and such securities and instruments held by the Funds from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain of the Equity Securities and exchange-listed equity index futures contracts held by the Funds from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Funds reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

- (4) For each Fund, at least 90% of such Fund's net assets that are invested (in the aggregate) in exchange-listed equity index futures contracts will be invested in instruments that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.
- (5) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (6) 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 for each Fund 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 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.
- (7) For initial and continued listing, the Funds must be in compliance with Rule 10A-3 under the Act.⁴¹

⁴¹ See 17 CFR 240.10A-3.

- (8) Each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets.
- (9) The Pricing Committee will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding each Fund's portfolio.
- (10) Each Fund will satisfy: (a) the ISG Criteria; and/or (b) the Alternative Criteria at the time of purchase and on a continuous basis.
- (11) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Funds 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.⁴² If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. This approval order is based on all of the Exchange's representations, including those set forth above, in the

⁴² The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will "surveil" for compliance with the continued listing requirements. See, e.g., Amendment No. 2 to SR-BATS-2016-04, available at: <http://www.sec.gov/comments/sr-bats-2016-04/bats201604-2.pdf>. In the context of this representation, it is the Commission's view that "monitor" and "surveil" both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view "monitor" as a more or less stringent obligation than "surveil" with respect to the continued listing requirements.

Notice, and in Amendment Nos. 1, 2, and 3 to the proposed rule change. The Commission notes that the Funds and the Shares must comply with the requirements of Nasdaq Rule 5735, including those set forth in this proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, is consistent with Section 6(b)(5) of the Act⁴³ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁴⁴ that the proposed rule change (SR-NASDAQ-2015-161), as modified by Amendment Nos. 1, 2, and 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

Robert W. Errett
Deputy Secretary

⁴³ 15 U.S.C. 78f(b)(5).

⁴⁴ 15 U.S.C. 78s(b)(2).

⁴⁵ 17 CFR 200.30-3(a)(12).