

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78592; File No. SR-NASDAQ-2016-061)

August 16, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to List and Trade Shares of the First Trust Equity Market Neutral ETF of the First Trust Exchange-Traded Fund VIII

I. Introduction

On May 4, 2016, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the First Trust Equity Market Neutral ETF (“Fund”), under Nasdaq Rule 5735. The proposed rule change was published for comment in the Federal Register on May 25, 2016.³ On July 5, 2016, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Fund, an actively-managed exchange-traded fund (“ETF”), under Nasdaq Rule 5735, which governs the listing and trading of “Managed Fund Shares” on the Exchange. The Shares will be offered by the First Trust

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77854 (May 19, 2016), 81 FR 33307 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 78227, 81 FR 44907 (July 11, 2016).

Exchange-Traded Fund VIII (“Trust”).⁶ First Trust Advisors L.P. will be the investment adviser (“Adviser”) to the Fund.⁷ Perella Weinberg Partners Capital Management LP will serve as investment sub-adviser (“Sub-Adviser”) to the Fund and provide day-to-day portfolio management. First Trust Portfolios L.P. will be the principal underwriter and distributor of the Fund’s Shares. The Bank of New York Mellon Corporation will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including the Fund’s portfolio holdings and investment restrictions.⁸

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 Registration Statement on Form N-1A for the Trust filed on March 14, 2016 (File Nos. 333-210186 and 811-23147). In addition, the Exchange represents that 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).

⁷ The Exchange represents that neither the Adviser nor the Sub-Adviser is registered as a broker-dealer. The Adviser is affiliated with a broker-dealer, and the Sub-Adviser is affiliated with two broker-dealers. Each has implemented and will maintain a fire wall with respect to its respective broker-dealer affiliate(s) regarding access to information concerning the composition of and/or changes to the portfolio. In the event (a) the Adviser or Sub-Adviser becomes newly affiliated with a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer 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, if applicable, regarding access to information concerning the composition of, or changes to, the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

⁸ The Commission notes that additional information regarding the Fund, 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 and the Registration Statement, as applicable. See Notice and Registration Statement, supra notes 3 and 6, respectively.

A. Exchange's Description of the Fund's Principal Investments

According to the Exchange, the investment objective of the Fund will be to seek long-term capital appreciation independent of market direction. Under normal market conditions,⁹ the Fund will seek to achieve its investment objective by investing at least 80% of its net assets in "Equity Securities" (as defined below), which may be represented by certain derivative instruments,¹⁰ as well as ETFs¹¹ that invest primarily in Equity Securities ("80% Investments").¹² The Equity Securities in which the Fund will invest will be listed on a U.S. or a non-U.S. exchange and will consist of the following: (i) common stocks; (ii) preferred

⁹ 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, the 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, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser or the Sub-Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

¹⁰ Such derivatives are defined as "Principal Derivatives." See "The Fund's Use of Derivatives," infra.

¹¹ ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission. In addition, the Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order that the Trust has obtained from the Commission. See Investment Company Act Release No. 30377 (February 5, 2013) (File No. 812-13895). The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depository Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs.

¹² The 80% Investments will take into account such derivative instruments and ETFs.

securities; (iii) warrants to purchase common stocks or preferred securities; (iv) securities convertible into common stocks or preferred securities; (v) securities issued by real estate investment trusts (“REITs”); (vi) securities issued by master limited partnerships (“MLPs”); and (vii) American Depositary Receipts (“ADRs”), European Depositary Receipts (“EDRs”), and Global Depositary Receipts (“GDRs” and, together with ADRs and EDRs, “Depositary Receipts”).¹³

The Sub-Adviser will use a long/short strategy in seeking to construct a portfolio that it believes, based on its proprietary analysis, will provide the opportunity for capital preservation and appreciation across a wide variety of market conditions. A portion of the Fund’s portfolio will typically be invested in Equity Securities selected by the Sub-Adviser through application of an event-driven strategy that seeks to identify and capitalize on certain corporate actions which may affect the value of Equity Securities, such as mergers and acquisitions, divestitures, tender offers, and other corporate events.¹⁴

The Fund’s Use of Derivatives

The Fund may engage in transactions in derivative instruments, as described in this paragraph. As noted above under “Principal Investments,” the Fund’s investments in Equity Securities may be represented by derivatives. Investments in Equity Securities that are represented by derivatives (referred to collectively as “Principal Derivatives”) will be treated as investments in Equity Securities for purposes of the 80% Investments. Principal Derivatives will consist of the following: (i) total return swap agreements;¹⁵ (ii) exchange-traded options on

¹³ The Fund will not invest in any unsponsored Depositary Receipts.

¹⁴ In connection with its event-driven strategy, the Fund may also invest a portion of its assets in Non-Exchange-Traded Equity Securities (as defined infra). See infra note 17 and accompanying text under “Other Investments.”

¹⁵ The Fund will only invest in total return swap agreements that have (i) referenced assets

stock indices; (iii) exchange-traded options on equity securities; and (iv) exchange-traded stock index futures contracts. In addition to purchasing exchange-traded options on stock indices and exchange-traded options on equity securities, the Fund may also sell such exchange-traded options, either outright or as part of an options strategy (such as a collar or an option spread). Additionally, the Fund may invest in non-U.S. currency swap agreements and forward foreign currency exchange contracts (collectively, “Non-Principal Derivatives”) to the extent described below in “Other Investments.” The Fund may also enter into currency transactions on a spot (i.e., cash) basis. The Fund will invest (in the aggregate) no more than 30% of the value of its net assets (calculated at the time of investment) in Principal Derivatives and Non-Principal Derivatives (“30% Limitation”).

The Fund will only enter into transactions in over-the-counter (“OTC”) derivatives (including non-U.S. currency swap agreements, total return swap agreements, and forward foreign currency exchange contracts) with counterparties that the Adviser and/or the Sub-Adviser reasonably believes are capable of performing under the applicable contract or agreement.

According to the Exchange, the Fund’s investments in derivative instruments will be made in accordance with the 1940 Act, will be consistent with the Fund’s investment objective and policies, and will not be used to seek to achieve a multiple or inverse multiple of an index. To limit the potential risk associated with the Fund’s derivatives transactions, the Exchange states that the Fund will segregate or “ earmark ” assets determined to be liquid by the Adviser and/or the Sub-Adviser in accordance with procedures established by the Board of Trustees of the Trust (“Trust Board”) and in accordance with the 1940 Act (or, as permitted by applicable

that are exchange-traded securities or (ii) referenced indexes that are comprised of exchange-traded securities.

regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. In addition, the Exchange provides that the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk.¹⁶ The Exchange represents that because the markets for certain securities, or the securities themselves, may be unavailable or cost prohibitive as compared to derivative instruments, suitable derivative transactions may be an efficient alternative for the Fund to obtain the desired asset exposure.

The Exchange states that the Adviser believes there will be minimal, if any, impact to the arbitrage mechanism as a result of the use of derivatives. Market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. The Exchange states that the Adviser believes that the price at which Shares trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem creation units at their NAV, which should ensure that Shares will not trade at a material discount or premium in relation to their NAV.

The Exchange states that the Adviser does not believe there will be any significant impact to the settlement or operational aspects of the Fund's arbitrage mechanism due to the use of derivatives. Because derivatives generally are not eligible for in-kind transfer, they will typically be substituted with a "cash in lieu" amount when the Fund processes purchases or redemptions of creation units in-kind.

B. Exchange's Description of the Fund's Other Investments

With respect to up to 20% of its net assets, the Fund may invest in and/or include in its portfolio (as applicable) the following securities and instruments (in the aggregate).

¹⁶ The Exchange represents that to mitigate leveraging risk, the Adviser and/or the Sub-Adviser will segregate or " earmark " liquid assets or otherwise cover the transactions that may give rise to such risk.

The Fund may invest in non-exchange-traded equity securities (“Non-Exchange-Traded Equity Securities”) acquired in conjunction with its event-driven strategy.¹⁷ The Fund may also invest in exchange-traded notes (“ETNs”) and in Non-Principal Derivatives.

The 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 Fund may invest in the following short-term debt instruments: (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; (4) repurchase agreements,¹⁸ which involve purchases of debt securities; (5) bank time deposits; and (6) commercial paper.¹⁹

The Fund may invest in money market mutual funds, U.S. exchange-traded closed-end funds, and other ETFs²⁰ that, in each case, will be investment companies registered under the

¹⁷ For example, in conjunction with its event-driven strategy, the Fund may acquire a Non-Exchange-Traded Equity Security as a result of a merger or other corporate reorganization. Certain Non-Exchange-Traded Equity Securities may be Rule 144A securities; the Fund will not invest in Rule 144A securities other than Non-Exchange-Traded Equity Securities. Additionally, Non-Exchange-Traded Equity Securities will not be represented by derivative instruments.

¹⁸ According to the Exchange, the 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 Trust Board. 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 the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

¹⁹ The 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.

²⁰ Such ETFs will not invest primarily in Equity Securities (and, therefore, will not be taken into account for purposes of the 80% Investments) but may otherwise invest in assets of any type.

1940 Act. In addition to ETFs and closed-end funds, the Fund may invest in certain other exchange-traded pooled investment vehicles (“ETPs”).²¹

The Fund’s portfolio may include exchange-traded and OTC contingent value rights (“CVRs”) received by the Fund as consideration in connection with a corporate action related to a security held by the Fund.²²

C. Exchange’s Description of the Fund’s Investment Restrictions

According to the Exchange, the Fund may not invest 25% or more of the value of its total assets in securities of issuers in any one industry. This restriction will not apply to (a) obligations issued or guaranteed by the U.S. government, its agencies, or instrumentalities or (b) securities of other investment companies.²³

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser and/or the Sub-Adviser. The 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 the Fund’s net assets are held in illiquid assets.

²¹ The Fund may invest in the following ETPs: trust certificates, commodity-based trust shares, currency trust shares, commodity index trust shares, commodity futures trust shares, partnership units, trust units, and managed trust securities (as described in Nasdaq Rule 5711); paired class shares (as described in Nasdaq Rule 5713); trust issued receipts (as described in Nasdaq Rule 5720); and exchange-traded managed fund shares (as described in Nasdaq Rule 5745).

²² CVRs will not be taken into account for purposes of the 30% Limitation.

²³ 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).

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act²⁴ and the rules and regulations thereunder applicable to a national securities exchange.²⁵ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,²⁶ 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 to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,²⁷ which sets forth the finding of Congress 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. In addition, an estimated value, defined in Nasdaq Rule 5735(c)(3) as the Intraday Indicative Value,²⁸ will be available on the NASDAQ OMX

²⁴ 15 U.S.C. 78f.

²⁵ 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).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²⁸ The Intraday Indicative Value will be based upon the current value for the components of the Disclosed Portfolio, as defined in Nasdaq Rule 5735(c)(2).

Information LLC proprietary index data service,²⁹ and will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Regular Market Session.³⁰

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 identities and quantities of the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.³¹

The Fund's NAV will be determined as of the close of regular trading on the New York Stock Exchange ("NYSE") (ordinarily 4:00 p.m., E.T.) on each day the NYSE is open for trading. Additionally, 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.

²⁹ 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 ETFs. GIDS provides investment professionals with the daily and historical information needed to track or trade NASDAQ OMX indexes, listed ETFs or third-party partner indexes and ETFs.

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

³¹ The Fund's disclosure of derivative positions in the Disclosed Portfolio will include sufficient information for market participants to use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund's 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, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; 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.

Quotation and last sale information for the following 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: Equity Securities; ETFs; closed-end funds; and ETPs. In addition, quotation and last sale information for U.S. exchange-traded options (including U.S. exchange-traded options on equity securities and U.S. exchange-traded options on stock indices) will be available via the Options Price Reporting Authority. Quotation and last sale information for U.S. exchange-traded stock index futures contracts, ETNs and CVRs will be available from the exchanges on which they are traded. Pricing information for exchange-traded equity securities (including Equity Securities; closed-end funds; ETFs; and ETPs), ETNs, exchange-traded CVRs, and exchange-traded derivatives (including options on stock indices; options on equity securities; and stock index futures contracts) will be available from the applicable listing exchange and from major market data vendors. Pricing information for Non-Exchange-Traded Equity Securities (including without limitation Rule 144A securities), short-term U.S. government securities, commercial paper, bankers' acceptances, repurchase agreements, OTC CVRs, non-U.S. currency swap agreements, total return swap agreements, forward foreign currency exchange contracts, bank time deposits, certificates of deposit, and currency spot transactions will be available from major broker-dealer firms, major market data vendors, and/or third party pricing services. Money market mutual funds are typically priced once each business day, and their prices will be available through the applicable fund's website or from major market data vendors. In addition, the Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further 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 Commission notes 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. Trading in the Shares will also be subject to Nasdaq Rules 4120 and 4121, including the trading pause provisions under Nasdaq Rules 4120(a)(11) and (12). Trading in the Shares 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 other assets 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 will also be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth additional circumstances under which trading in the Shares may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. In addition, the Exchange represents that neither the Adviser nor Sub-Adviser is registered as a broker-dealer; however, the Adviser is affiliated with a broker-dealer, and the Sub-Adviser is affiliated with two broker-dealers, and each has implemented and will maintain a fire wall with respect to its respective broker-dealer affiliate(s) regarding access to information concerning the composition and/or changes to the portfolio.³²

³² See supra note 7. 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, Sub-Adviser, and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act, which requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of their

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.³³ The Exchange also represents that FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund (including Equity Securities, closed-end funds, ETFs, ETPs, ETNs, exchange-traded CVRs, options on stock indices, options on equity securities, and stock index futures contracts) with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”),³⁴ and FINRA may obtain trading information regarding trading in the Shares and such exchange-traded securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-traded securities and instruments

relationship with their clients as well as compliance with other applicable securities laws. Accordingly, investment advisers must have procedures designed to prevent the communication and misuse of non-public information, 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.

³³ The Exchange states 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.

³⁴ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (“CSSA”).

held by the Fund 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 CSSA. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

- (1) The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.³⁵
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.³⁶ Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also 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 Exchange rules and applicable federal securities laws.³⁷
- (3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund (including Equity Securities, closed-end funds, ETFs, ETPs, ETNs, exchange-traded CVRs, options on stock indices, options on equity securities, and

³⁵ See Notice, supra note 3, at 33313.

³⁶ Id.

³⁷ Id.

stock index futures contracts) with other markets and other entities that are members of the ISG, and FINRA may obtain trading information regarding trading in the Shares and such exchange-traded securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund 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 CSSA. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.³⁸

- (4) At least 90% of the Fund's net assets that are invested (in the aggregate) in exchange-traded derivatives and in exchange-traded CVRs will be invested in instruments that trade in markets that are members of ISG or are parties to a CSSA with the Exchange.³⁹
- (5) At least 90% of the Fund's net assets that are invested (in the aggregate) in ETNs and in exchange-traded equity securities will be invested in securities that trade in markets that are members of ISG or are parties to a CSSA with the Exchange.⁴⁰
- (6) The Equity Securities in which the Fund will invest will be listed on a U.S. or a non-U.S. exchange.⁴¹

³⁸ Id.

³⁹ Id. at 33313–33314.

⁴⁰ Id. at 33314.

⁴¹ Id. at 33308.

- (7) ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges.⁴²
- (8) The Fund will not invest in any unsponsored Depository Receipts.⁴³
- (9) The Fund will only invest in total return swap agreements that have (i) referenced assets that are exchange-traded securities or (ii) referenced indexes that are comprised of exchange-traded securities.⁴⁴
- (10) While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs.⁴⁵
- (11) The Fund will only enter into transactions in OTC derivatives with counterparties that the Adviser and/or the Sub-Adviser reasonably believes are capable of performing under the applicable contract or agreement.⁴⁶
- (12) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser and/or the Sub-Adviser.⁴⁷
- (13) The Fund will not invest in Rule 144A securities other than Non-Exchange-Traded Equity Securities. Additionally, Non-Exchange-Traded Equity Securities will not be represented by derivative instruments.⁴⁸

⁴² Id. at n.10.

⁴³ Id. at 33309, n.12.

⁴⁴ Id. at 33309, n.15.

⁴⁵ Id. at 33308, n.10.

⁴⁶ Id. at 33309.

⁴⁷ Id. at 33310.

⁴⁸ Id. at n.20.

- (14) The Fund may not invest 25% or more of the value of its 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.⁴⁹
- (15) The Fund will invest (in the aggregate) no more than 30% of the value of its net assets (calculated at the time of investment) in Principal Derivatives and Non-Principal Derivatives.⁵⁰
- (16) 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 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. The

⁴⁹ Id. at 33310.

⁵⁰ Id. at 33314.

Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.⁵¹

- (17) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.⁵²
- (18) The Fund’s investments in derivative instruments will be made in accordance with the 1940 Act, will be consistent with the Fund’s investment objective and policies, and will not be used to seek to achieve a multiple or inverse multiple of an index.⁵³
- (20) To limit the potential risk associated with the Fund’s derivatives transactions, the Fund will segregate or “ earmark ” assets determined to be liquid by the Adviser and/or the Sub-Adviser in accordance with procedures established by the Trust Board and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk.⁵⁴
- (21) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.⁵⁵

⁵¹

Id.

⁵²

See 17 CFR 240.10A-3.

⁵³

See Notice, supra note 3, at 33309.

⁵⁴

Id.

⁵⁵

Id. at 33313.

The Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio, (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 Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the 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 and in the Notice, and the Exchange's description of the Fund. The Commission notes that the Fund and the Shares must comply with the initial and continued listing criteria in Nasdaq Rule 5735 for the Shares to be listed and traded on the Exchange.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act⁵⁶ and the rules and regulations thereunder applicable to a national securities exchange.

⁵⁶ 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵⁷ that the proposed rule change (SR-NASDAQ-2016-061), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

Robert W. Errett
Deputy Secretary

⁵⁷ 15 U.S.C. 78s(b)(2).

⁵⁸ 17 CFR 200.30-3(a)(12).